IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMBER GASCHO,	)	CASE NUMBER
	)	2:11-CV-436
PLAINTIFF,	)	
VS.	)	COLUMBUS, OHIO
	)	FEBRUARY 13, 2014
GLOBAL FITNESS HOLDINGS, LLC,	)	
	)	10:00 A.M.
	)	
DEFENDANT.	)	

FAIRNESS HEARING
BEFORE MAGISTRATE JUDGE NORAH MCCANN KING
UNITED STATES DISTRICT COURT

APPEARANCES OF COUNSEL:

FOR PLAINTIFF:	THOMAS N. McCORMICK, ESQ. KENNETH J. RUBIN, ESQ. GREGORY M. TRAVALIO, ESQ. MARK H. TROUTMAN, ESQ.
FOR DEFENDANT:	DAN L. CVETANOVICH, ESQ. BRANDON McGRATH, ESQ. RICHARD S. GURBST, ESQ.
FOR BLACKMAN OBJECTOR:	ADAM E. SCHULMAN, ESQ. THEODORE J. FRONECK, JR., ESQ.
FOR ZIK OBJECTORS:	JOSHUA T. ROSE, ESQ. GREGORY A. BELZLEY, ESQ.

INDEX

Thursday Morning Session,

February 13, 2014.

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THE COURT: Ms. Rector, call the case, please.

COURTROOM DEPUTY CLERK: Case Number 2:11-CV-436, Gascho v. Global Fitness Holdings, LLC.

THE COURT: We are here today for the Fairness Hearing, which Judge Smith referred to me for a hearing, and evidentiary hearing if appropriate, to be followed by a Report and Recommendation. I think I would like to go through the formality of having all counsel enter their appearance on the record, please.

MR. McCORMICK: Thank you, Your Honor. Good morning. Tom McCormick on behalf of the plaintiffs.

MR. RUBIN: Your Honor, Ken Rubin, also on behalf of plaintiffs.

MR. TROUTMAN: Mark Troutman on behalf of the plaintiffs.

MR. TRAVALIO: Greg Travalio, Your Honor, on behalf of the plaintiffs.

THE COURT: Thank you. Then, for the defense?

MR. McGRATH: Brandon McGrath on behalf of the defendant.

MR. CVETANOVICH: Dan Cvetanovich on behalf of the defendant.

MR. GURBST: Richard Gurbst on behalf of the defendant.

THE COURT: We also have in the courtroom counsel for the objectors. Could I ask the representative for Josh Blackman to please enter your appearance?

MR. FRONCEK: Local counsel is Theodore Froncek on behalf of Mr. Blackman.

MR. SCHULMAN: Adam Schulman.

THE COURT: Thank you. And for the Zik objectors?

MR. ROSE: Yes, Joshua Rose and Greg Belzley.

THE COURT: All right. Thank you.

I'd like to start out giving counsel for the plaintiffs an opportunity to address the Court in support of the proposed settlement.

MR. McCORMICK: Thank you, Your Honor.

If I may approach, Your Honor? I do have some copies of the Power Point slides for the Court's reference, if it so desires.

THE COURT: All right. Okay. Thank you.

MR. McCORMICK: Here we are.

THE COURT: I assume you have provided this to defense counsel and counsel for the objectors?

MR. McCORMICK: Yes, Your Honor.

THE COURT: Thank you.

MR. McCORMICK: May it please the Court, at the

Fairness Hearing, Your Honor, the Court's job is to insure that settlements taken as a whole are fair, reasonable and adequate to the class. We begin this morning by emphasizing that point because this settlement, when taken as a whole, is not just fair, reasonable and adequate to the class, it is a good settlement for the class, and it provides tremendous value to the class.

This is a good settlement because each and every class member has the opportunity to recover the majority of their damages -- and in some cases more than their actual damages -- from defendant Urban Active, a company that's no longer in business. The settlement provides real money to these class members, not coupons or other in-kind benefits.

In exchange for these cash payments, the release provided pursuant to the settlement is limited to the facts contained within this lawsuit. The settlement eliminated any and all risks of an adverse judgment, which we know from other class actions that were filed against Urban Active was a substantial and significant risk.

The claims process used here to allow class members to recover cash payments could not have been easier and could not have been more user friendly. Urban Active also separately agreed to pay all of the settlement administration costs that were occurred by Dahl Administration.

And last, Urban Active separately agreed to pay class

counsel's attorney fees and costs, and class counsel agreed to accept a value less than their lodestar pursuant to the settlement agreement. Combined, all of these factors make for a great settlement, and they provide tremendous value to the class.

During our arguments today, I want to quickly provide to you a little road map of how we are going to present. I am going to start by presenting substance as to structure of the settlement, to the merits of the claims and to the value provided to the class. Then, I am going to turn things over to our Settlement Administrator, Mr. Jeffrey Dahl, and he is going to inform the Court of the work that his company did to administer this settlement. And then, finally, we are going to close with a presentation by my co-counsel, Mr. Troutman, and he is going to address our Motion for Enhancement Payments and our Motion for Attorney Fees.

We begin, then, by talking about the structure of the settlement, and the structure of the settlement begins with the class. The class includes everyone who signed a gym membership contract or a personal training contract with Urban Active. Class certification is appropriate here because by signing that contract, each member was subjected to practices and policies of Urban Active that failed to comply with State Consumer Sales Practices Acts.

Within the class, we have three subclasses. The Gym

Cancel subclass includes everyone who canceled their contract. Certification is proper here because by canceling, each class member was subjected to practices and policies of Urban Active that frustrated that member's ability to cancel, denied that member the ability to cancel and/or led to continued charges after cancellation.

Also, within the class we have the Facility Improvement Fee subclass. The Facility Improvement Fee subclass includes anyone who paid one of Urban Active's $15 Facility Improvement Fees. Class certification is appropriate here because as alleged in the complaint, Urban Active had a practice and policy of failing to properly disclose these fees to its members.

And then, finally, we have the Personal Training Cancel subclass. This includes anyone who canceled their personal training contract. And just like the Gym Membership Cancel subclass, certification is proper here because by canceling, each subclass member was subjected to practices and policies of Urban Active that denied or frustrated members' abilities to cancel and resulted in continued charges after cancellation.

Now, for the class and each one of the subclasses, ultimate success of this lawsuit hinged upon both proving a violation of the law and proving that damages actually stemmed from that violation. By way of example, through the course of

discovery, we collected strong evidence that Urban Active had policies and practices which violated State Consumer Sales Practices Acts. However, for these violations, damages were not readily apparent. In addition, the fact that there were very few judicial decisions discussing the appropriate damages when a contract can be rescinded or discussing appropriate damages when a contract would be void, raised the risk that substantial damages may not be recovered.

This risk was only heightened by Urban Active's equitable argument which they made may continually and throughout the litigation that these members were happy members for six months, 12 months, 18 months, and they used the gym. So, voiding or rescinding a contract may not necessarily lead to disgorgement of the funds paid pursuant to that contract. These factors combined, again, to raise a substantial risk that even if we had taken this case all of the way through trial and succeeded on the merits, the damages may not have exceeded what we negotiated pursuant to this settlement.

From a merits standpoint, there were also substantial risks. Specifically, the Robins' decision out of the Northern District of Ohio was a stark reminder that courts may strictly interpret these contracts against the consumers. This posed a significant risk to both our Gym Cancellation subclass and our Facility Improvement Fee subclass because Urban Active's conduct in charging additional fees after cancellation and

charging $15 Facility Improvement Fees was arguably authorized within the terms of its own contracts.

Despite these and the other hurdles that we discussed in our papers that we have previously filed, we balanced these risks. We balanced the risks of continuing to litigate, and we negotiated a favorable settlement. As the Court, I am sure is well aware, the dollar values that we negotiated are: $5 to every class member; $20 to every Gym Cancel subclass member; $20 to every Facility Improvement Fee subclass member; $30 to every Personal Training Cancel subclass member for a potential total of $75 per claimant.

These numbers are especially favorable to the class for a number of reasons. First, in order to receive this money, all class members had to do was file a claim. They didn't need to provide any proof, and they didn't need to provide any evidence that they were members of these subclasses. If they fit the definition and they were within Urban Active's data base, they filed a claim and they got the money.

Second, there was no limit on the number of claims that would be paid. There was no cap that existed. Every class and every subclass member that filed a claim was entitled to receive and will receive the negotiated settlement payment.

Thus, the total value available to the class here is the product of simple math. It is not a mirage; it is not

fiction like some of the objectors have alleged. It is simple math. There is over 605,000 class members. Payment of $5 amounts to a potential recovery of exceeding $3 million. The same with the Gym Cancel subclass, the potential recovery exceeding $6 million. The Facility Improvement Fee subclass, potential recovery exceeding $6 million, and the Personal Training subclass, again, a potential recovery exceeding $1.5 million.

Potentially, the total liability pursuant to the settlement and the total funds being made available by Urban Active in this case exceeded $17 million. As the Supreme Court has instructed and as the Northern District has noted, "The right to share in the harvest of a lawsuit, whether or not that right is exercised, is still a benefit to the class." Pursuant to the settlement, the class is benefiting by the availability of over 17 million to it.

Now, additional benefits to the class, as I mentioned earlier, include Urban Active's agreement to pay all of the settlement administration fees, which are estimated to be about $500,000. And it also includes Urban Active's agreement to pay the legal fees and costs of class counsel, which amounts to $2,339,000. Urban Active's agreement to pay these monies is an additional benefit to the class as instructed by the Sixth Circuit, and, again, by the Northern District of Ohio.

Another way to look at this settlement and determine

whether or not it is providing value to the class is by looking at the average recovery per claimant. Pursuant to the settlement, we had approximately 50,000 class members file claims. The average recovery per class member is $36.50.

Now, we are going to be discussing our Gym Cancel subclass in some detail later today, so it is worth noting that for our average class member, who is also a member of the Gym Cancel subclass, the average payment that they are going to receive pursuant to this settlement is $44.07.

To put those numbers into context and to give the Court a frame of reference, the average fee paid per month by an Urban Active member is $26. So our average class member is going to take home $10.50 more than what they paid on average per month. Our average Gym Cancel subclass member is going to take home almost $20 more than what they paid on average per month to be a member at Urban Active.

This comparison can be further -- the value of the settlement, I should say, can be further shown by comparing this value to other recent health club settlements that have taken place -- Vaughn v. L.A. Fitness was a recent decision or recent settlement out of the Eastern District of Pennsylvania; Martina v. L.A. Fitness, a recent settlement out of the District of New Jersey; and Friedman v. 24-Hour Fitness, a recent settlement out of the Central District of California.

Vaughn, Martina and Friedman all alleged claims that

were very similar to the claims that are alleged by our Gym Cancel subclass members. So, the appropriate dollar comparison is the $44.07. Vaughn, Martina and Friedman -- the recovery is shown on the screen -- and it dwarfs in comparison to what our average class member is going to be taking home.

Another important point about Vaughn, Martina and Friedman, each one of these settlements had a coupon element. And as this Court knows, coupon settlements in class action context are universally disfavored. Coupon elements are disfavored for a number of reasons, but among them, the costs are less to the defendant. The true value of the coupon is hard to determine. And for the most part, coupons amount to nothing more than advertising or marketing for the defendant because in order to use the coupon, you have to continue doing services with that defendant.

The Vaughn court specifically really struggled with the coupon aspect of this settlement, and it noted in its opinion that because of the coupon aspect, the actual cash payments being made by L.A. Fitness were not that significant. Our settlement is noticeably different. There are no coupons. There are no vouchers. It is a straight cash payment to each and every class member. The value is unsaleable.

Another way we can look at the tremendous value being provided pursuant to this settlement is to look at the objectors. As noted in Urban Active's Motion to Strike,

Mr. Blackman has absolutely zero damages. He paid Urban Active nothing. But yet pursuant to this settlement, he is entitled to recover $25 as a member of the class and as a member of the Gym Cancel subclass. Obviously, a tremendous value.

We can also look at the Zik-Hearon class. Now, as I noted earlier, the Zik-Hearon class partially overlaps with the claims of our Gym Cancel subclass. So, the appropriate dollar comparison is our $44.07, which is the average recovery that will be taken home by a member of our Gym Cancel subclass. If Zik-Hearon were to continue with their claims and succeed on the merits, their average recovery would total $36. And that average recovery is made up of the average payment for one month's dues, which is $26, plus $10 for the Cancellation Administration fee that was charged by Urban Active.

So, comparing the potential recoveries, we have $44.07, which is a guaranteed recovery if this settlement is finally approved versus the opportunity to recover $36. And I want to emphasize, that's only an opportunity to recover $36. In order for that opportunity to come to fruition, it is going to take about three to four years of continued litigation. Zik-Hearon group is going to have to get class-certified. They are going to have to succeed on the appeal of that class certification decision, which is an appeal as of right under Kentucky law. They are then going to have to survive on a Motion for Summary Judgment, which we know is coming because of

the Robins decision out of the Northern District. They are then going to have to succeed at trial on the merits. And they are then going to have to succeed on the appeal on any potential recovery that is made.

Viewed in this context, $44.07 today versus potential recovery of $36 three to four years now, there is simply no comparison. This settlement provides a tremendous value to the class.

To conclude this discussion of value to the class, all of these comparisons, all of these figures, all of this analysis firmly establishes one thing, the class is recovering a tremendous amount of money based upon the potential claims that they have brought in this litigation, and that recovery is guaranteed if this settlement is finally approved.

I now want to switch gears for a moment and discuss the claims process that was used in this litigation -- or I'm sorry -- that was used in this settlement. To recover the monies that I have just been talking about, class members simply had to file a claim form that was available on Dahl's website or available by mail. The objectors have argued that this claims process was unnecessary and that it renders this settlement unfair. This argument is both factually inaccurate and legally unsupported.

Factually, the claims process here served three primary purposes. First, and most importantly, Urban Active's

data base of customers was unreliable. A claims process was needed to insure that the money actually ended up in the hands of class members.

Second, the open claims process that was negotiated pursuant to this settlement allowed any class member to file a claim, even if they didn't receive the email notice that was sent or the postcard notice that was sent. As explained in Dahl's supplemental affidavit -- which we will be shortly providing you updated copies of -- pursuant to that supplemental affidavit, this open claims process, allowing anyone to go to the website and file a claim has resulted in approximately 350 class members who were previously unknown or unidentified to file claims and be deemed allowed claimants pursuant to the process set forth in the settlement agreement.

Now, this stands in stark contrast to the objectors' additional arguments that no additional class members would be found pursuant to the open claims process.

Third, and related to that second point, the open claims process allowed class members to select subclass membership above and beyond what was shown in Urban Active's records. So, the open claims process has given class members the ability to recover additional monies on top of what was known pursuant to Urban Active's records. And as explained in Dahl's supplemental affidavit, they are currently reviewing approximately 2500 such claims by class members that they are

entitled to more money than they otherwise would have gotten if checks had just been sent in the mail.

Now, within those three points, I do want to come back and spend a little bit more time on the unreliability of Urban Active's data because that's really the central point here.

Urban Active's customer data base, which was used to create the class list, was a customer data base created on information that was created by the class member at the time they signed their contract. Given that fact, the information that is within the customer data base is best case scenario one year old and worst case scenario eight years old. By that I mean Urban Active stopped doing business in October of 2012. Claims notices didn't go out until October of 2013. So, the most recent piece of data in that claims -- in that customer data base was one year old. Again, worst case scenario, that information had been provided eight years ago. And the vast majority of the class members joined somewhere between three and five years ago. So, this data was outdated and unreliable.

The simple fact is that within the 600,000 names in the data base, no person can go through and state affirmatively that any of those name and address combinations are actually current addresses. No one knows. It is outdated data.

So, for this reason alone, the argument that the parties just should have simply mailed checks to all of the

class members is ridiculous. Those checks would have gone out, and they would have been received --

THE COURT: May I interject for just a moment here?

MR. McCORMICK: Absolutely.

THE COURT: Of course, the objectors will have an opportunity to elaborate on this.

Is that a fair representation of the objectors' objection in this regard? Or are the objectors -- this is an unfair question -- but is the objection more that once addresses were verified and/or at least verified by the evidence of the non-return of the notice, at that point the check or payment should have been made directly?

MR. McCORMICK: Sure. The way we read their objections is that the payments just should have been sent out. However, even if the addresses -- even if you waited until the second step and you verified some addresses, there is still no assurance that just because a postcard was delivered, it was actually received by the class member. The postcard very well could be delivered or a check very well be delivered to an address, but that person no longer lives at that address. So, just because we went through processes to verify addresses, that doesn't provide any assurances that a check that is being sent is actually being received by the class member that's entitled to receive that check.

THE COURT: Thank you.

MR. McCORMICK: Yes. Given all of these factors that I have just discussed, the easy user-friendly claims process that was used here was entirely appropriate and was reasonable. However, even setting aside the factual situation that we encountered with this settlement, the objectors' argument that a fair settlement requires the direct mailing of checks is simply unsupported.

Cases cited by the objectors in their briefs were thoroughly discussed in our responses, and I am not going to belabor the point, but it can be summarized as saying: In each and every one of those cases, the settlement was rejected because of gross fundamental problems with the settlement. And the rejection had very little, if anything, to do with the fact that a claims process was being used.

I do want to focus, however, on one of the cases cited by the objectors in their brief. And that's Burden v. Selectquote Insurance Services. In Burden, the objectors cited the case for the proposition that a court refused to grant preliminary approval because a claims-made process existed for administration of the settlement.

That part is true. The court refused to grant preliminary approval. And what the court did was it instructed the parties to file supplemental papers explaining why a claims-made process was reasonable in that situation. And it is important to note that Burden was an employee in a wage and

hour class action. The facts of that case were that the class members were current or former employees of the company. Clearly, if it is a current employee of the company, the defendant had accurate information, and it could easily provide payment to that person. So, immediately the facts are distinguishable.

But what's really notable about this case is that plaintiffs' counsel filed the supplemental brief, just like the Court asked. And in justifying the claims-made process, plaintiffs' counsel cited three reasons: (1) claims-made processes are not inherently unreasonable, (2) it was the result of arms-length negotiation, and (3) the opportunity to submit a claim provides a benefit to the class. There was no other justification provided for the claims-made process in this case, and the Court approved the claims-made process despite the fact that the class -- a significant portion of the class members were current employees of the company.

Now, Burden, out of the Northern District of California, isn't the only court to make similar decisions. Here in the Southern District of Ohio, Kritzer v. Safelite Solutions, again, an employee wage and hour class action where a significant portion of the class members were current employees. Clearly, accurate contact information existed. Nevertheless, the court approved a claims-made process for administering funds from the settlement.

Now, a few final thoughts on the claims-made process. Both plaintiffs and Urban Active in our responses to the objections cited a number of cases in which -- similar to Kritzer -- in which claims-made processes were approved by courts. The objectors have attempted to distinguish these cases in a number of ways, but two ways primarily. One, they argue that there were no objections in those cases, therefore, the decisions are somehow irrelevant. And second, they say that in all of the cases that we cited -- or in some of the cases that we cited -- the claims-made process served a legitimate purpose because the class member had to make a choice between a cash payment and a coupon.

Now, let's talk first about the lack of objectors. As this Court knows, judges have an independent duty to insure that settlements are fair, reasonable and adequate. The absence of an objector says absolutely nothing about the prevalence or the reasonableness of claims-made settlements.

As to the second argument, that the class member had to make a choice between a coupon and cash payment, as we have already discussed, coupons are universally disfavored in class action settlements. But now we have an objector justifying a claims-made process because there was a coupon element as part of the settlement. Here, we have no coupon element because they are universally disfavored. The objector's argument is entirely backwards, and it exposes counsels' entire position on

this as being without merit.

The simple fact is that claims-made settlements are routinely approved by courts, and objectors have not cited a single case where a court has disapproved or disallowed a fair and adequate settlement, like we have here, simply because of a claims-made process. Given the condition of Urban Active's data and the value being provided to the class here, there is nothing unfair, and there is nothing unreasonable. And it is, in fact, appropriate that a simple, easy user-friendly claims-made process be used to insure that the money is actually received by the class member who is entitled to receive it.

Now with that, I am going to ask Mr. Jeffrey Dahl from Dahl Administration to come up and make a short presentation regarding the settlement website and the work that they did pursuant to the settlement agreement. And because of our discussion earlier, I don't know if you want to have him sworn in?

THE COURT: I mean no disrespect to Mr. Dahl --

MR. McCORMICK: Sure.

THE COURT: -- but certainly presentation by counsel admitted to the Bar of this court is different than an unsworn presentation.

MR. McCORMICK: Sure. If the Court would prefer, we can have him sit on the witness stand, and I can do this as a

question-and-answer format?

THE COURT: I think that would be the better course.

MR. McCORMICK: Okay.

THE COURT: Mr. Dahl, could you step forward and be sworn, please?

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JEFFREY DAHL

AFTER HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

- - -

DIRECT EXAMINATION

BY MR. McCORMICK:

MR. McCORMICK: First, I will approach the witness and allow him to use the clicker, if it is okay, for him to scroll through some slides during my questioning?

Q. Good morning. Could you please state your name for the Court?

A. Jeffrey D. Dahl, D-A-H-L.

Q. Thank you. And what's your educational background?

A. I have a BA from Concordia College in Moorhead, Minnesota.

I have a certificate, a Certified Public Accountant from the State of Minnesota, currently in inactive status.

Q. Do you have any other educational qualifications?

A. I took graduate accounting level courses at the University of Minnesota, both in business and to obtain my CPA certificate.

Q. And what is your current employment?
A. Currently, I am president of Dahl Administration.
Q. What is Dahl Administration?
A. Dahl Administration is a class action claims administration firm that provides administrative services for a variety of consumer and other types of class actions.
Q. How long have you been working at Dahl Administration?
A. Approximately five-and-a-half years.
Q. What did you do before Dahl Administration?
A. Before Dahl Administration, I was a founding partner of Rust, R-U-S-T, Consulting, Minneapolis, Minnesota. I was there for approximately 15 years. When I left Rust, they had approximately five offices, about 600 employees and was the second largest class action claims administrator in the country.
Q. Can you describe for us some of the cases you have worked on either at Rust or in your current position at Dahl?
A. Sure. When I was at Rust, I did approximately -- the firm did approximately 2500 class actions. I personally was responsible for about 300 of those.

Since leaving Rust and starting Dahl, at Dahl, we at any point in time we have about 100 current settlements in process. In our five-year period, we have completed about 300 class action settlements. Primarily in consumer employment.

Some of the cases that I have done of note, I was a

court-appointed distribution agent for the SEC, Fannie Mae settlement. It was a $350 million security case.

I was the court-appointed claims agent for the W.R. Grace Asbestos bankruptcy. I was responsible for receiving approximately 200,000 personal injury claims and processing those with a budget of $1.7 billion bankruptcy.

I was appointed by the Special Master in the Google Research Analyst Settlement. It was a Security Exchange Commission settlement involving a number of different defendants. It was a $450 million settlement. I was responsible for the receipt and processing of notice and the payment of those claims.

I did work on the CD Music settlement for the nationwide Attorney Generals. It was one of the largest class actions ever settled. They had about 100 million class members.

Q. Thank you. Can you describe for the Court your involvement with this class action settlement?

A. I was the partner in charge of overseeing the claims administration services for this case. So, I was actively involved in, you know, oversight and the implementation of our services. Our services generally involved notice to the class, handling class member communications, processing claims, reviewing claims, curing claims, and we ultimately will be responsible for the distribution of the money involved in this case.

Q. Okay. Based upon your experience, how did this class action settlement and specifically the notice process and claims process compare to other class action settlements you have worked on?

A. From an administrative standpoint -- let me start with the notice. I mean, you know, typically, we measure notice in terms of reaching frequency. That's what percentage of the class do we reach and how many times do we reach them. In most settlements, we have a defined class list. We would provide direct mail notice to the class. You know, we get some return mail. So, we would retrace or re-mail, and we would expect to hit, you know, 90 percent or 90 percent plus based on that. So, in terms of reaching frequency, we would reach 90 percent of the class one time. In the vast majority of settlements, you know, that's all the notice that's really required where we have, you know, a known class list.

In this settlement, we reached out beyond that. Concurrent with the mail notice, we did an email notice with anyone who had a current email address. Subsequently, we did a reminder email, and then we published twice in one Sunday and one consecutive day in 13 different newspapers where the defendant operated, you know, facilities.

So, I mean it was a very robust notice program, and, you know, depending where you fit in the class, I mean you could have both seen the notice twice in the published notice, you

could have received, you know, two e-mails and a postcard notice. So, we would have reached some class members with a frequency of up to five times.

Q. Okay. The notice that was sent, as you have just described the notices that were sent in this case were postcard notices and email notices, what is your experience with the effectiveness of mailing postcards versus mailing long form notices?

A. Well, we have a lot of experience with notice because in almost every case we mail some sort of notice. I like -- personally like postcard notices. You know, there has been an evolving trend over the last, you know, three or four years towards postcard notices both in state courts and federal courts. You know, they are designed to meet Rule 23 standards. You know, even under the best scenario that we know of with long-term notices using the Federal Judicial Center Guidelines for notice, it is an eight or 12-page notice, it is what gets under plain language requirements, but it gets really difficult for class members to understand it.

Our experience with postcard notice, particularly linked with online filing, is that it is a modern -- you know, I like it because it is a modern approach to providing notice. You can grab people's attention for a short period of time. If you link it to an online filing website, my experience is that we get very robust filing rates. We have done a lot of review for

this, and our experience is that we get twice the filing rate with our postcard and online versus a paper filing claims process.

You know, it follows how people tend to consume media. You know, if you do an email notice, which we had in this case, you are one click away from the website. And it follows for the trends, you know, today. Given the choice between paper and online, we see 90 percent plus, and in some instances up to 98 percent of people choosing the online option versus the paper option.

Q. Okay. Now, you mentioned in that response a number of times the website and online filing capabilities. I know we have a few slides prepared, and I guess I'd like you to go through and describe for the Court the website that was created and how a class member would file a claim.

A. Sure. You know, we post websites today for almost every settlement. And we are finding more and more people go to the website as their first point of finding additional information about the settlement. In this particular case, we had, I think, about 110,000 website hits and, you know, we had 6,000 phone calls, and that's kind of consistent with our experience in other cases.

Our website follow a format that has been -- is pretty consistent between claims administrators, and it is consistent in being involved with the courts over the last, you know, five

or ten years. You will notice in the upper left-hand corner we have a series of buttons. There is a home page, which we are on now, which gives a summary of the case, and it links to sort of other pages within the website. There is a section of Frequently Asked Questions and Answers. So, people can, you know, view a list of questions and can click on an answer within that section.

And for instance, if they are clicking on: How do I file a claim? There will be hot links where they can click a link, and they will be transferred directly to the claim filing page.

We have key dates. It is all the key dates that the class member needs to knows about. They are concisely displayed in one section.

We have a "File a Claim Page", which we will show you later. There is a link to settlement documents where people or class members can view or download and print case documents, and there is a contact page where people can contact the claims administrator. They can do that in email. There is an 800-number that is shown on the website, also, and displayed on all of the published or printed materials.

On the first page, I would just like to point out at the bottom, there is a call-out portion of the page where people can file a claim form. If they click a button here, it will take them directly to the claim filing page.

Q. Can you show us that, please? Thank you.

A. This is our claim filing page. You know, it gives fairly concise instructions. You will notice there is "hot links" here, one that goes to the "Long Form Notice", and you can view that. Another one goes to "Frequently Asked Questions".

It has the filing deadlines clearly displayed. And there is a button to click to file online.

In Item 2, you can also request a "Long Form Notice", and there is an 800-number, you know, prominently displayed, and we have a "File a Claim" button, you know, that they can click if they would like to file a claim.

When class members file a claim, they have two methods of filing a claim. And I will discuss the second method that's on the bottom of the screen first. When we send an email or a postcard to a class member, we include a check-digited number, which gives them a claim and ID number. And if they can put their claim and ID number and the first three characters of their mailing name that shows on their postcard, then we can pre-populate some information and make the claim filing process a little quicker.

If they don't have a card, for instance if they saw the published notice or if they heard about it from somebody else, they can click the button -- I'm sorry -- they can click the button above right here, and it will take them to a different claim filing screen, and they don't necessarily have to have the number to file a claim.

This is the "File a Claim" screen for people without an ID number. We ask for minimal information -- name, address, city, state and zip -- in order to file a claim.

This is the screen for people that have their ID number. If they have an ID number, it pre-populates the upper portion here with their name and their original mailing address and given the opportunity to update their mailing address in this section below.

Once the class members have put in the initial information, we bring them to this screen. We do capture an email address of class members if they have one because that allows us to do subsequent follow-up with an email. And then we have a relatively simple check of your box screen that class members click for, you know, the different categories of class membership to which they belong. You will note that the claim awards are promptly displayed and a description of the classes included in that screen.

After they have completed that information, there is a, you know, a click in terms of certification and then a verification step that they hit to continue, and that, in fact, files their claim.

The last step is if we provide a verification that their claim has been filed. It is provided in two forms. One, we electronically provide it -- or excuse me -- we are at a screen here that allows -- if a claim isn't perfected, then they will

have to click the certification statement and they will have to click --

Q. If I could interject with a question here? Now, this screen is if the claim form is improperly completed; is that correct?

A. Yes, sir. For instance, if you didn't select a subcategory or subclass or if you didn't electronically certify your claim, then you would see one of these messages, and you would have to go back and click something.

Q. So, does that allow for the class members -- it is kind of a foolproof method to make sure that the class member properly electronically completes the claim form?

A. That's correct. It is a verification method to make sure we get the claim form as technically complete as possible.

Q. Thank you.

A. And then the last step is we give them a note that your claim is submitted. We display on the screen a confirmation number. And then concurrent with that, we will electronically send them their confirmation via email that their claim has been submitted electronically. And if they have any subsequent questions, they can refer to that number in any such subsequent communications with us.

Q. Does that complete, then, the claims filing process?

A. Yes.

Q. Thank you. Now, in your experience as a settlement

administrator, have you also administered settlements where cash payments or checks were sent directly to class members without the claims-made process?

A. We have.

Q. Okay. How common or how frequent is that?

A. Well, in the 300 cases we have done in the last year, we have done a handful where we have sent checks out directly. On the consumer side, we have three cases. All three of those were insurance cases where we sent a notice, and then we sent a check directly to the class members.

You know, I think we should note that in those cases, we had a high reliance on the defendant data because it were either current or former clients that had, you know, account relationships, and we had data that we knew was reliable.

We also on a few unemployment cases, we had a process where we would send a check. But out of maybe 100 employment cases, we probably had maybe ten or 12 where we may have sent a check instead of a claims process. Most of them are still claims-made processes.

Q. I want to go back and clarify something you said. You said both with the insurance cases and the employment cases, it was a high reliability on the data. What exactly did you mean by that?

A. Well, in insurance, they are customers. We have policy information. You know, many of them are current customers.

You know, some might be former customers, but because they have a policy relationship, we have -- you know, we feel like we have very good underlying data.

On the employment side, we have, you know, employment records. So, we have social security numbers. We have employment payroll records, and we have information we have reliance on.

But overall, in my experience across 3,000 settlements, you know, most of those settlements have been made claims-made and relatively few -- when I say relatively few, you know, maybe less than ten or 20 -- that we would mail direct payments to them.

Q. In any of those, you know, handful, ten or 20 cases where direct payments were mailed, did you ever mail payments directly when the data that was provided by the defendant was in best case one year old and worst case eight years old?

A. No to my knowledge. All the ones had some sort of current component to the data.

MR. McCORMICK: Thank you, Mr. Dahl. That's all of the questions that I have. If the Court would prefer cross-examination now, or we can continue on with Mr. Troutman's portion of the presentation concerning enhancement payments and attorney fees.

THE COURT: I will leave it up to the objectors, but I would think that waiting and asking Mr. Dahl to remain

available until the objectors make their presentations would be more acceptable. What's your preference?

MR. BELZLEY: With Mr. Dahl on the stand, I am happy to do it now before a break.

MR. SCHULMAN: I think that makes sense.

THE COURT: Okay. How long do you think your examination, your inquiry will take?

MR. BELZLEY: I think now, based on what we heard, I think mine will be at least a half-hour, maybe a little more than that.

MR. SCHULMAN: And then I plan on making a presentation of about 15 minutes to a half-hour.

THE COURT: When you say presentation?

MR. SCHULMAN: Oral argument.

THE COURT: I am just talking about inquiry and cross-examination of Mr. Dahl.

MR. SCHULMAN: I only have about seven or eight questions.

THE COURT: Okay. And you think that your cross-examination of Mr. Dahl would take upwards of half an hour?

MR. BELZLEY: It might, Your Honor.

THE COURT: Okay. Let's take a 15-minute recess.

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THEREUPON, a recess was taken.

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THE COURT: Before we get to the objectors, is there any inquiry on behalf of the defendant?

MR. McGRATH: No, Your Honor.

THE COURT: All right.

MR. BELZLEY: Thank you, Your Honor.

THE COURT: Please step forward, and you can proceed.

And if you prefer, you can pivot that podium around so that you can see.

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CROSS-EXAMINATION

BY MR. BELZLEY:

Q. Your Honor, counsel. Good morning, Mr. Dahl.

A. Good morning.

Q. I want to try to be short. I don't want to cover what ground you have already covered, but I want to ask some questions based upon that.

MR. BELZLEY: Before I do that, however, if it pleases the Court, Your Honor, I have prepared just a piece of demonstrative evidence. And for the lack of a better term, I call it "numbers", and what I have done is I have kind of gone through Mr. Dahl's declaration and his supplement and just pulled all of the numbers out. We may be referring to some of this during my cross of Mr. Dahl.

Q. (By Mr. Belzley) Mr. Dahl, you were present, were you not,

during Mr. McCormick's presentation?
A. I was.
Q. And you heard him say that the purpose of the claims process in this case was three-fold: Number one, Global Fitness's data was unreliable; Number two, the open claims process found 350 new class members; and Number three, class members got an opportunity to get more money than Global Fitness's record said that they were owed; is that right?
A. That's correct.
Q. All right. Let's take those one at a time. Let's talk about first the reliability of Global Fitness's records. As I understand your Declaration, prior to mailing notice in this case, Global Fitness provided you their data base and before you mailed anything you did a double-check, you ran that through some kind of a national address data base, did you not?
A. Well, when we receive data from a defendant -- and I am going to talk specifically in relationship to mailing addresses -- you know, we do a number of things. You know, first, we make sure that the data is in a consistent format. In other words, it is last name, comma, first name. You know, we may do some address hygiene to separate out -- for instance, it would not be unusual to have, you know, zip codes keyed into a state field, for instance. So, we do some address hygiene to standardize addresses as best we can.
And then we go through the data, and we look for data

anomalies. We look for missing or unmailable addresses, you know, that may occur in the data base. We may look for any exact duplicates that are in the data base. We do some address hygiene things to make sure that we have identified as many mailing addresses as possible.

You know, there may be some interaction with defendants in terms of providing additional information, you know, to fix some of those things, and there may not be. Once that's done prior to mailing -- and, you know, we run the information through the National Change of Address Data Base. You know, that data base really does two things. One, it standardizes addresses to postal regulation formats. So, for instance, I used to live at 102 Second Street Northwest. You can spell that many different ways. But it cast certifies that, and it changes that address to "102 2ND", capital "ND", and street is abbreviated to capital "ST" and northwest is made "NW". So, there is that component of the national address process that standardizes addresses.

Then, the National Address Data Base updates addresses for anyone who went into the Post Office and filled out a change of address card. And it updates that address for either three or four years, depending on what data base you used. We can use one that goes back four years. And if you filled out a card, then it would update that to a more current address.

Q. Okay. Well, and here I was standing here thinking all you

did was run it through just the USPS National Change of Address Data Base. You did more than that.

The point is that what you are telling the Judge, before you ever mailed out a postcard, before anything was ever sent to a potential class member in this case, you didn't just take Global Fitness's data base and start mailing stuff, you assumed and through your practice as a claims administrator develop a process by which you go through and improve the, if you will, the integrity of that data base, correct?

A. Well, if I wasn't clear, I am always speaking to the mailing name and address portion, but yes. We go through a process to get the most updated information that's available from the Post Office.

Q. Okay. And once you had that information, then you mailed out the postcards. You sent out, according to your affidavit, 601,494 postcards, representing 99.3 percent of the class. You had 146,617 come back, and 91,275 of those were sent to either forwarding addresses that you were provided or new addresses that your company found through address search, correct?

A. Yeah. And I am going to preface this by saying that I am relying on your numbers here, I am not taking numbers directly from the affidavit. Assuming your numbers are the same as mine, then that would be correct.

Q. Okay. Okay. And when all is said and done, in your Declaration you represented to the Court that you were

confident that 90.8 -- that mailed notice had reached 90.8 percent of the 605,000 class members, correct?

A. Well, my presumption is that 90.8 percent of the notices sent, you know, were, in fact, delivered. When we deliver them to the Post Office, we are presuming they are delivered to the recipient, you know, but we don't have a way of definitively saying they actually reached the class members. We presume that it was delivered in the mail, much like when you mail your utility check, you are assuming it goes to the utility company.

Q. Well, I am looking at Paragraph 45 of your initial Declaration and you state: As of November 29, 2013, the notice reached at least 90.8 percent of potential class members? You said that, did you not?

A. I did.

Q. Now, the other 9.2 percent came back to your offices and couldn't be forwarded because there was no additional address or no other address to send them to, correct?

A. Well, we go through a little bit -- a little different process than what you are describing. When notices comes back as undeliverable -- everything in our data base has a unique I.D. number. We have a bar code on the notice. And when it comes back in, we scan the bar code. We have to indicate in the data base that it comes back as undeliverable. Some of the ones that come back have a yellow sticker on it that are attached to the outside of the notice that has a new address.

And presumably, those are people who have moved and aren't in the NCOA, National Change of Address system but have a new address. So, those are entered into our system and mailed to a new address, and we call those forwards.

We also have ones that come back that are returned, and we don't know why they are returned. You know, those are run through Experian, which is one of the three large data base providers which will give us a better address. They will look at address history and other information in their data base and tell us that they believe that person now lives at a different address. And in those instances, then we mail that card to that better address.

Q. Yeah. Well, I know all of that, but what I am asking is that you believe or represented to the Court that 90.8 percent of the notices reached class members. And I understood that figure to be --

THE COURT: Can I interject here? I think the term was "potential class members".

Q. (By Mr. Belzley) Okay. Potential class members. And I understood that 90.8 percent figure to be the number of mailings, the number of envelopes that went out and didn't come back?

A. In the end, that's the number of postcards that went out.

Q. Okay. The other 9.2 percent?

A. Yes.

Q. For whatever reason, they didn't get anything sent to them?

A. Their cards were sent to them, but they came back "undeliverable" and no better address was found.

Q. Okay. Now, the actual total claims in this case, you represented was 55,597 claims but that included 2,161 duplicates, correct?

A. That included -- yes. I am relying on your numbers here again.

Q. All right. So, if you subtract the duplicates, you have got 53,436 actual claims?

A. Okay.

Q. Okay. And that's -- my calculation shows that 8.8 percent of the class.

Now that aside, you have represented and you have testified this morning that a 9.2 response rate in this case is a strong filing percentage due in part to the robust notice program and the easy filing process.

Now, you are a founding partner of Rust Consulting; are you not, sir?

A. Yes.

Q. Are you aware in the DeLeon case that Rust Consulting represented to the court that consumer class settlement response rates ranged from 2 percent to 20 percent?

A. Well, I am not aware of that particular representation.

Q. Is that consistent with your experience?
A. Well, I mean I have my own experience related to claims filings and my own opinion related to that.
Q. Well, the representation, at least according to the master judge in that case, was 2 percent to 20 percent depending upon a variety of factors, including the amount the claimant will receive and the requirement to submit a claim form.

To the extent that the response rate in this case was actually 8.8 percent instead of 20 percent, what do you attribute that to? The amount? The requirement of a claims-form process?

MR. McCORMICK: Objection. Mr. Belzley is putting evidence into the case that he has no foundation for.

THE COURT: I will sustain the objection. I think that you are implying that this witness agrees with whatever the reasoning of the magistrate judge in the DeLeon case was. You can ask this witness questions about what he means when he says that the "response rate in this case was robust" and what his opinion of that was and why he thought it was and why the response rate might not have been higher but not in the form that you have presented that question.

Q. (By Mr. Belzley) Okay. Well, in your experience, how -- what is the top range of response rates in consumer class actions?
A. Well, let me address my experience with ranges in consumer

class actions in general. A number of years ago I participated in a study with Professor McGovern at Duke University, and we looked at 10 million class notices that were mailed across a variety of cases, and we looked at response rates to those cases. In the consumer area, they ranged from one point something, I think up to 11 or 12 percent in the range that -- in consumer cases. They were somewhat higher in employment cases. Lower in some other cases. We looked at securities. We looked at employment. We looked at finance cases, a variety of case types.

Overall, I know in the consumer area, the median response for us, the middle response was about 5 to 8 percent, in that range. I am going from memory here, but on a fairly broad base, you know, those results are consistent with what I would see on normal consumer cases across a variety of cases.

Q. Okay. All right. Now, what percentage of the U.S. population has access to the internet?

MR. McCORMICK: Again, Your Honor, I think that question lacks foundation and calls for speculation.

THE COURT: Well, if this witness has personal knowledge, he can answer. And if he doesn't, he can indicate he doesn't.

A. I have personal knowledge of that. I think the current studies estimate 80 percent plus. It varies by state. Some of the southern states have a fairly low internet rate, being in

the 60 percent range. You know, some of the more urban states are in the 90 percent range. It increases, obviously, every year. As of the last census, I believe the overall knowledge here was of the high 90 percent, I believe.

Q. Okay. Now, it appears that 97.4 of the claims in this case were filed by email. Only 2.6 percent of the claims were filed by mail. Does that sound about right?

A. Not email but online.

Q. Online, I'm sorry. Does that indicate to you that claims typically were not filed unless the claimant had access to the internet?

A. Not particularly. And I want to clarify my previous answer. When we say people have "online access", you know, people have access to the internet a whole variety of other places without, you know, being in that 80 percent I talked about. They have access at work. They have access through libraries, from friends, through phones or other devices.

Q. When it comes to mailing notice, the decision was made to send a postcard. Was that your decision, or was that what you were told to do by the parties in this case?

A. No, that is what was approved by the court, and presumably negotiated by the parties.

Q. Okay. You have administered class actions where, instead of just a postcard, an envelope with a notice and the claim form was sent to the class member, was it not?

A. Yes.

Q. But that's considerably more expensive than mailing just a postcard?

A. It is more expensive.

Q. Now, I want to talk about the number of people that have gotten more -- or may get more money because of this claims process. According to your numbers, 29,000 or 54.3 percent of the claims filed have already been awarded money, and it is my understanding from your declaration that that's because the claimant asked for an amount equal to or less than what was reflected in the data you were provided by Global Fitness?

A. That's correct.

Q. Okay. So, it was easy at that point, Global Fitness is offering them more or the same amount they are claiming, simple. I assume in that situation they got what Global Fitness's records reflected?

A. Yes.

Q. Okay. Now, that left 20,473 people who claimed more than what was reflected in Global Fitness's records. So, let's drill down into this. You sent them deficiency notices, asking for more information to this 20,473 people. Only 2,464 responded, 12 percent?

A. Yes.

Q. If you didn't respond, the 88 percent that didn't respond were told in the deficiency letter, if you don't respond, you

will get what the Global Fitness records say that you are entitled to, correct?

A. Yes.

Q. So, at this point we have got 2,464 people who might get more money than the Global Fitness records reflect; is that right?

A. That's correct.

Q. Can you tell the Court how it is going to be determined, how y'all decided to determine whether these people get more money or not?

A. Well, we are currently going through those responses. You know, the responses are falling in a couple of different categories. Some have responded and opted to, you know, enclose additional information. In other words, they have just shown us or given us their member ID. Some have responded with information that shows they are a member of one of the other subclasses. Some have responded with narrative information that they didn't have the information but have described a fact pattern where they may -- or have indicated that they are eligible for other classes.

For the people that have proof, you know, we are giving them the higher award amount. For anyone who has made a representation that, you know, they belong in a different class, we are giving them the benefit of that representation. We also had a few in that class that said, oh know, I made a

mistake when I filled out my form. And we had some that had not documented the claim and probably ended up getting what we have in the records as our best indicator.

Q. Okay. Of these 2,464 people, do you have a sense at this time of what percentage of that group will actually get more money?

A. As of this morning, I think we were -- had gone through about 900 of those, and it appears about 30 percent of those will get more money based on the initial review.

Q. So, if that holds, roughly one-third of this group of 2,464 people or around 800, 900 people are going to get more money?

A. That's correct.

Q. So, if we are looking at this settlement and the claims process as being noted as important and essential so that more people or where people have a chance to get more money, the numbers show that 800, 900 people of the roughly 50,000 claims are going to get more money or have a chance of getting more money, correct?

A. Well, I think your numbers are somewhat skewed. People that provided -- you know, for instance checked more subclasses than the data showed, all had the opportunity to provide additional information to get more money. Of that, we can believe about 30 percent have responded and provided that proof, but in the end -- in the end the ones that will

ultimately get more money will be about 800.
Q. Okay. About one-third of these 2,464, and according to my figures, about one-tenth of 1 percent of the class?
A. I will rely on your estimates.
Q. And if this claims process was necessary for that, for the sake of one-tenth of 1 percent of the class getting a chance to recover or getting more money, over a half-million class members didn't get a penny; is that right?
A. Well, of the people that made claims, those who used the claims-made process, so your numbers are, in fact, right, people had the opportunity to file a claim and people had the opportunity, you know, to indicate if they thought they were due additional money.
Q. All right. Now, let's turn to the open claims process that was able to find more class members. 3,964 or 7.4 percent of the actual claims filed, there was no Global Fitness record of membership, correct?
A. That's correct.
Q. These people, because there was no Global Fitness record of membership, I would assume that these 3,964 did not get mailed notice?
A. Well, I don't know that for a fact. We weren't able to match them back to a record in the data base.
Q. All right. Now, of this number, 3,964, there were 545 that you said in your supplemental declaration that you believe

were fraudulent?
A. We have -- I think potentially fraudulent was the word that I used.
Q. Potentially fraudulent. Why did you send them deficiency notices?
A. Because I said potentially fraudulent. It means that we had -- we know, for instance, in this settlement, there is a class action website called rebateclassactions.com, and I think this settlement was posted on that website. So, then we also, you know -- our claim filing -- our online claim filing system process is fairly sophisticated. So, when someone files a claim, we know the IP address or the computer that they file the claim from. When we have multiple claims filed from the same computer address, it raises a red flag within our system. We go back and look at those claims. And in many instances, we had multiple claims from the same address but different spelling of the name or different things, and then we flag those as a suspicious claim.

Our normal process, though, is we do give everyone a chance to perfect their claim with a cure. So, they may send a cure letter just like everyone else and have the opportunity to perfect their claim. Because as I mentioned earlier, we say "potentially fraudulent", we really don't know.
Q. Okay. But the fact of the matter is, even with a notice and a claims-made process, there is the potential that there

will be fraudulent claims and some of those fraudulent claims will be paid?

A. There is always that potential. We do whatever we can to monitor for that process.

Q. Now, how did you -- you said in your supplemental declaration that you validated 343 of the 358 responses that you received to this membership deficiency notice. How did you do that? How did you validate it?

A. Well, we used a very similar process that we described earlier. If proof is provided with their claim, some sort of proof, you know, we validate their claim. If they made a statement or a representation, you know, then we took that into account. And if we believe that was adequate, we validated that.

We were able to validate most of the responses. In situations -- we had a relatively small number, I believe -- that we weren't able to validate, and we are in the process of reaching out to those class members to see if they can provide more information.

Q. All right. So, of these 3,964 claims that raised issues of whether they were members at all, it appears that 343 are actually going to get approved and actually get some money?

A. That's correct.

Q. Now, I want to spend a little more time on the issue of fraud. Because this claims process was described to the Court

as being necessary to make sure people who get the money are entitled to receive it.

Now, I think you have just admitted that even in a notice and claims process, that there is some potential for a fraudulent claim being paid. So, it is not a guarantee against payment of fraudulent claims, is it?

A. It is not a guarantee.

Q. Okay. There were 545 claims that were filed that you believed were potentially fraudulent and that came, according to my math, to 1 percent of the claims filed, 9/100ths of 1 percent of the class.

Now, do you believe that based on your experience that there is more or less incentive to file a fraudulent claim than there is to forge an endorsement on a check?

A. I really don't have an opinion on that.

Q. Okay. Let me ask you this. Are you aware of any instance in any of the claims -- the class actions that you have administered in which a claim believed to be fraudulent was prosecuted? Referred to the criminal authorities?

A. I mean, in my experience over the years we have referred a few claims to the prosecuting authorities. For sure, in the marketplace there has been some claims referred to prosecutors. You know, so the answer is yes, I am aware of some.

You know, but I am not aware of a tremendous amount of identified fraudulent claims. Where they are is I think it

depends upon the size and magnitude of the claim and how the claim administrators and the parties want to pursue that.

Q. Can you tell us whether any of those claims that were referred to a prosecutor were $20, $40, $60?

A. I really don't have knowledge.

Q. Okay. Now, I think we have seen today, and you saw today in the Power Point presentation, that according to the parties in this case, Mr. Blackman, he is getting $25 when Global Fitness records show that he is not entitled to anything.

Was there any discussion about that that you were involved in with the parties, about the propriety of paying somebody who -- as to whom the records reflected had no damages at all?

A. We had no discussions with the parties related to the treatment of individual claims that you are describing.

Q. Do you know -- you have been involved in claims administration of direct payment classes, correct?

A. Yes.

Q. There is the potential for somebody forging the endorsement in those checks, forging an endorsement on a check that's directly mailed to somebody but who comes into the hands of somebody other than the class member?

A. Yes.

Q. Do you have a sense of what the percentage of that is, or what the rate is?

A. You know, I don't have any, you know, knowledge of

instances where, you know, class members didn't receive checks.

Q. Well, I am talking about where somebody other than the class member got the check and forged it and got the money?

A. I don't have direct knowledge of instances related to that. I am sure it happens.

Q. All right. To sum up, based on Global Fitness records, you represent to the Court in your Declaration that notice reached 90.8 of potential class members, correct?

A. That's correct.

Q. Over 99 percent of the claimants -- awarded claimants in this case are going to receive what the Global Fitness records show they were entitled to be paid, correct?

A. Based on your numbers, yes.

Q. And this open claims process resulted in increasing the size of the class from -- I think it was 6/100ths or 6/1000ths of a percentage?

A. According to your numbers. I am going to rely on you for the math.

Q. Those results -- we are talking about the results here, that it is those results that justify over a half a million class members in this case not getting a penny?

MR. McCORMICK: Objection, Your Honor.

THE COURT: Sustained.

MR. BELZLEY: No further questions, Your Honor.

THE COURT: Mr. Schulman?

MR. SCHULMAN: Thank you, Your Honor. I will try to be brief since Mr. Belzley covered some of the ground I wanted to discuss for address verification.

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CROSS-EXAMINATION

BY MR. SCHULMAN:

Q. Thank you for joining us, Mr. Dahl. I am glad to see you here this morning.

I was wondering if you had the updated numbers as far as the current claims that have been verified, the number of claimants, a dollar figure?

A. I don't have any numbers beyond those in my supplemental Declaration.

Q. Okay. I want to ask you a little bit about -- Mr. Belzley discussed how there were class members that checked too many boxes, and then you had to send a deficiency notice to those class members to get a response from them. Do you have any data whether there were any class members who checked too few boxes and thus would have been underpaid?

A. Yes.

Q. There were such class members?

A. Yes.

Q. Do you have an approximate number?

A. There were a significant number that underchecked.

Q. It was in the thousands?

A. Yes.
Q. I wanted to ask a little bit about whether it would have been feasible -- in your Declaration, I believe you said that 97.4 percent of claims were submitted online. Would it have been feasible for you to have established online objection and opt-out process? Have you done that in other cases?
A. We have done an online opt-out form, but I am not aware of having an online objections form.
Q. Would it be feasible for you?
A. I guess everything is feasible. It is not my experience, but it is feasible.
Q. So, the only reason that there wasn't such an online opt-out form in this case was because the parties settled and that they brought to you -- they didn't allow for that?
A. Well, you know, our role is really to implement the settlement agreement approved by the courts. So, we are working off of that document and attachment. So, we are really following that guidance.
Q. In your experience as a settlement administrator, do you have any sense of what percentage roughly of settlements have no objectors at all?
A. Well, I don't have any particular, you know, definitive data on that, but we do a lot of settlements that don't have objectors.
Q. Are you aware of the FJC study which surveyed settlements

in several district courts and found that 42 to 64 percent of settlements showed no objectors?

A. I haven't heard of that study.

Q. I want to ask you a little bit about my client specifically, if you could testify as to that. Do you have knowledge that he was sent a notice, an email notice?

A. I don't have -- actually, I don't have any direct knowledge of your client in particular.

Q. Could I ask you specifically about clients that are -- class members that are similarly situated to my client, in that class members who signed up for a gym membership and then canceled it within three days after that, are you aware?

A. I don't have specific knowledge.

Q. Okay. Do you know whether Mr. Blackman was sent a deficiency notice?

A. I don't have any particular knowledge of Mr. Blackman's notice claim. I did not look at his.

Q. Do you know whether class members in the same situation as Mr. Blackman were sent a deficiency notice meaning --

A. I am not sure what his situation is as relates to the other class members or what you are trying to say.

Q. Oh, I'm sorry. Oh, okay. Right. By his situation, I mean those class members who signed up and canceled their membership within three days?

A. Well, I have previously testified, you know, the data that

we were provided in terms of providing notice was provided by defendants from their data base. I don't have specific knowledge as to how that was accumulated from defendant's standpoint, who was involved and included or how they were included.

Q. So, if a class member had been sent email notice, then it is safe to say that you consider them to be a class member; is that correct?

A. I consider the lists that we received from defendants to be the definitive class list. If they were sent notice, then I would presume that they would be a part of the class.

MR. SCHULMAN: Okay. Thank you. No further questions.

THE COURT: Any questions on redirect?

MR. McCORMICK: Fairly short redirect, Your Honor.

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REDIRECT EXAMINATION

BY MR. McCORMICK:

Q. During cross-examination, opposing counsel asked you about the number of class members who filed claims and claimed less money than what was shown in Urban Active's records, and you indicated that there were a number of people that did that, correct?

A. That's correct.

Q. What determination did Dahl make with respect to those

claims?
A. Well, the determination of the final validation of the claims was my determination. Of course, all the claims categories were based upon the terms of the settlement agreement. If we had people that had underclaimed, then I determined I would pay them the higher amount based on the defendant's records.
Q. So, all benefit was given to the class member?
A. Yes.
MR. McCORMICK: Thank you, Your Honor.
THE COURT: Thank you, Mr. Dahl. You may step down.
I believe we were in the midst of the presentation?
MR. McCORMICK: Yes, Your Honor. And the presentation now is going to turn to Motion for Enhancement Payments and Attorney Fees, and my co-counsel, Mr. Troutman, will handle that for us.
THE COURT: All right.
MR. TROUTMAN: If I can have a moment? I think I can turn this.
THE COURT: There is a plug underneath it that's probably causing some problems there.
MR. TROUTMAN: Is it centered okay, Your Honor?
THE COURT: Okay. That's fine.
MR. TROUTMAN: Thank you. Your Honor, we wanted to turn separately to the issue of Enhancement Payments and

Attorney Fees just like they were negotiated with Urban Active. What both of these issues come down to is the real benefit that goes to the class doesn't show the preferential treatment warned against by the case law cited by the objectors.

Surprisingly, CCAF's attacks on the incentive awards for the class representatives, they challenge that somehow the Enhancement Payments undermine their ability to act as fiduciaries to the class. This argument is firmly and solidly rebutted by looking at the significant recovery achieved for all of the individual class members. This wasn't a coupon case. And as we'll see when we look closer at both the Pampers case and the Bluetooth case, that these weren't zero sum settlements to the class members. Again, it was $36.50 average per person. Even in Blackman's situation, as you have heard twice -- and hopefully, this will be the last time you have to hear it -- is getting $25 when his damages was actually zero dollars. The significant recovery itself proves that they have fulfilled their duties.

In fulfilling their duties, they did things like bringing the claims to the attention of the class lawyers. They answered discovery. They met with their lawyers numerous times to make sure that their allegations were properly worded in the amended complaint. Some of them gave depositions. All of them participated in the discovery process. And as it was negotiated, there were three separate amounts based upon their

respective burdens and contributions that those class members made.

Your Honor, turning to Attorney Fees. Class counsels' motion for fees is based upon a reduced lodestar amount combined with a common fund cross-check. Your Honor, the lodestar method is appropriate here for three reasons. First of all, a number of the plaintiffs' claims involve fee shifting statutes. As the Supreme Court said in Farrar v. Hobby, the settlement agreement that provides comparable relief to that litigation qualifies as a prevailing party. This was even noted by the Bluetooth case cited by the CCAF.

Second, the court in Lonardo, the Northern District Court in Lonardo held that this district routinely follows the lodestar approach. It is particularly appropriate when that lodestar fund is created separate and distinct from the fund of money available for the class.

And third, Your Honor, the lodestar approach is the preferred methodology to award fees set forth -- is the appropriate methodology set forth by the Sixth Circuit.

Although the objectors take issue with the use of the lodestar method and the proper application of common fund cross-check, their authority goes against the Van Horn case as decided by the Sixth Circuit and the Lonardo case as decided by the Northern District of Ohio. In the Van Horn case, the District Court and the Sixth Circuit struck down the very same

arguments that you are hearing from the CCAF today. And ironically enough, in the Lonardo case, the CCAF was actually a participating objector, and the court again struck down the same arguments against a constructive common fund approach that's being advocated by the CCAF.

THE COURT: I should have asked this earlier. When you say CCAF?

MR. TROUTMAN: It is Mr. Blackman. It is his entity. It is CCAF, the Center For Class Action Fairness.

The nomenclature was used in some of the briefing. Mr. Blackman and CCAF, they are same thing.

Your Honor, in terms of authority that is cited going against this common fund approach and the cross-check and the lodestar method being advocated by the plaintiffs, it is CCAF/Blackman begin by arguing very strongly about the Pampers litigation, but as I started, it is very important to see the actual relief that's getting to the class members. These cases are night and day, Your Honor.

If you look at this table, it displays the differences. Under the box, "Class Members Benefits", it talks about the reimbursement having "negligible" value. To clarify that, what the Pampers case actually allowed for was years after you bought a box of diapers, if you still had your UPC and you still had your receipt somewhere, you could send that in to P&G and receive a reimbursement for the box of diapers.

On top of that, it was the same exact reimbursement program that they had instituted pre-litigation.

So, the court concluded that the dollars actually flowing to the individual class members was negligible. They didn't even have the statistics available at the final Fairness Hearing to say how many dollars actually got in the hands of the class members.

We have a stark contrast here. As you have heard, we have between $5 and $75, and then with an average of $36. We have created a fund of $17 million that's available for the class. $19 million of benefit if you count the attorneys fees and settlement administrator costs with a claim rate of 9.2 percent.

What payments were made in real money in the Pampers case was a $400,000 cy pres award to various organizations to help with diaper rash and infant health and changes were made to the boxes to give warnings like diapers may cause diaper rash, things that people already know. What we have here is between 1.55 and 2.16 million dollars that will be paid out to class members, which is a stark contrast to a cy pres award of $400,000.

The Pampers case was settled before the plaintiffs even responded to the defendant's 12(b)(6) motion. As this Court well knows, the plaintiffs were able to sustain their claims after two 12(c) motions. As you know, Your Honor, from

handling it personally, I think we counted 15 status conferences where very rarely do the parties ever agree about the scope of discovery and what needed to be obtained. It just isn't the same case that the Court was dealing with when the Court questioned Pampers.

As you probably read it in the reply brief or in briefing from the objectors, they continually talk about the fictive notion of the relief that's getting to the class members. That word "fictive" comes out of Pampers. What it held was all these things -- except the attorney fee award -- were fictive. It said all of these things were fictive relief going to the class because there wasn't real dollars. And it said the only real thing was the attorney fee award at the bottom.

We don't have that case. First of all, our attorney fee award is even less than that. And none of the rest of the things on the Gascho side of the boxes can be considered fictive.

Your Honor, in turning to the Bluetooth settlement, it is no better than the Pampers case. What happened in Bluetooth was the class member benefit was zero dollars. It was a warning going out to future Bluetooth purchasers that this could cause hearing loss if you turn it up too loud. Again, in a stark contrast to the real money that's getting back in the hands of class members if the settlement is

approved.

In terms of payments by the defendant, instead of a $400,000 cy pres award, the Bluetooth case had $100,000 cy pres award. The case proceeded no further in discovery. There was no limited discovery while the parties awaited the 12(b)(6) motion. Again, a stark contrast to the three years of hard-fought litigation that you and the Judge have overseen in this case.

And lastly, the attorney fee award in Bluetooth might even be more shocking than the fictive one that was noted in the Pampers case because it constituted eight times the cy pres award. So, the lawyers were asking to be paid $850,000 when the total max out-of-pocket was only $100,000 in the Bluetooth case. As both of these cases show, they aren't the case before the Court that we are seeking final approval for.

Your Honor, what is true here on the fee award is that the plaintiffs have agreed to accept significantly less than the current lodestar value. Since the time that the fee petition was submitted, our lodestar has continued to grow while we have worked to get this settlement approved before the Court. We are now just shy of $2.8 million, which corresponds to a .85 multiplier. We are talking about some of the higher multipliers that we see in other cases.

Actually, Your Honor, we wanted to go through three comparable fee cases to show that courts do rely upon the

common fund that's available for the benefit of the class. The first case the Court will well know that we briefed extensively, which is the Lonardo v. Travelers Indemnity Company case. Ultimately, the court approved a lodestar multiplier in that case when there were about 50,000 claims. So, there are about the same number of claims, and an actual cash payment in the neighborhood of what we are looking at. And it based the propriety of that award off a total available fund of approximately of 18 million.

Similarly, a state court case in the Berry v. Volkswagen Group of America case actually awarded a lodestar of right around three million when the class only filed claims forms corresponding with $150,000 of an available $23 million, the pot of money for the plaintiffs' claims.

What the court did in citing Lonardo is it said where the potential value of the suit was $23 million, that the $150,000 result didn't rebut the presumption that the lodestar was an appropriate fee to be awarded.

Lastly, Your Honor, in the Dennings case, the court awarded a lodestar fee of about -- almost 1.9 million for a class recovery of 2.7 million when the court noted that the available fund of money to the class, should everyone avail themselves of it, ranges in the tens of millions of dollars. The important part in this case is that the court looked at the fee shifting provisions under the consumer statutes and found

that the lodestar method was the preferable method to follow.

Your Honor, as a brief note to shore up an issue raised in the reply, both objectors seem to still question where the money is going should this Court approve the 2.39 million dollar fee as in what happened to the Seeger case and what happened to the Robins case filed in the Northern District of Ohio that was dismissed.

We hope to set forth clearly enough for the Court that 72 percent of the fee award would go to the Vorys law firm and 28 percent would go to the Isaac, Wiles law firm. There has been no other agreement and no other allocation to any other lawyers involved, whether in those cases or otherwise.

Your Honor, in trying to wrap up the issue of fees, the Zik-Hearon objectors actually request a fee that far exceeds $300,000. It greatly exceeds the lodestar figure. It isn't commiserate with the fee petitions that have been filed by plaintiffs' counsel, and frankly, it is unsupported by any evidence in the record; so that the Court shouldn't consider granting such a fee.

Moreover, Your Honor, the Zik-Hearon objectors haven't provided a benefit to the class, and they didn't contribute to the settlement in any manner. When we finalized the settlement with Urban Active, we were very happy with the results achieved for the class. We attempted to contact the Zik-Hearon plaintiffs. We figured that they could contribute

to helping express the benefits to the class, to the Court in obtaining final approval. And we had a belief that their lodestar was around $150,000. So, we reached out to them and offered to share in the fee award to the extent that they could help obtain final approval for the settlement class.

Instead of joining with and helping getting money in their class representatives and the class' hands, they, in turn, objected. They are trying to keep the class from getting any kind of settlement award. So, to that extent, they aren't trying to benefit the class in any way. So, we think any fee award coming out of the fund set aside for the class would be inappropriate for the Court.

Your Honor, all of the things that I have just presented on the enhancement awards and the fee petition come back to one thing, and that is there is no evidence of preferential treatment between class counsel, class representatives and the class. This is a good settlement with real dollars that you are getting into people's pockets. You are going to hear the objectors focus on elements of the settlement and lines in the settlement agreement and then try to apply authority that has either never been applied anywhere or never been applied anywhere within the Sixth Circuit or this Court under these circumstances.

The question before the Court that Mr. McCormick started, is whether this settlement is fair, reasonable and

adequate. And given all of the evidence that we have presented this morning, we submit to the Court that it should be finally approved as just that.

Thank you, Your Honor.

THE COURT: Thank you. And who will be making the presentation on behalf of the defendant?

MR. McGRATH: Your Honor, Brandon McGrath. I just have a very brief statement, a couple of points that I would just like to make.

Your Honor, as you are aware, this has been a very difficult litigation. We have been in front of you -- at least on the telephone -- numerous times. And as arguments that I have made to you, we believe that we have significant defenses in this case, and we believe that the plaintiffs have significant risks. But like any case, both sides have significant risks. And that's why we entered into this settlement. We believe this settlement is fair to everyone -- the class members and the defendants.

Obviously, we filed this motion to strike Mr. Blackman's objection. To a certain extent, it was really our fault for not even considering to try to exclude from the class people who literally -- literally -- had no harm. As we crafted this settlement agreement, perhaps that's our fault for not clearly excluding those types of people. You have seen our arguments in the briefs that we believe it was a rescission,

and as a matter of law he was put back as he was, as if he had never signed a contract. But either way, Your Honor, that's clearly our mistake in not making that more clear. We never intended to provide a remedy to people who had no harm.

Your Honor, we, Global Fitness, want this settlement approved. We want to put those cases behind us. As has been mentioned several times, the company is no longer operating health clubs. It has sold off all of its health club assets. It has no current ongoing businesses.

We believe that the agreement that we have reached is fair and that it provides a tangible benefit to people who believe that they were harmed.

Thank you, Your Honor.

MR. GURBST: Your Honor, may I clarify something that was said?

The way I heard it, I didn't want what was said misunderstood. Richard Gurbst. And I apologize, Brandon. It is easier for me to tell the Court than it is for me whisper it to you.

When Brandon says: "It was our fault", it is the lawyers' fault. We are not saying, though, that we are not willing to deal with the consequences. We may have not lawyered it well, and therefore, he gets his 25 bucks, but we are not saying we want you to rewrite anything. We are willing to deal with the consequences.

THE COURT: Thank you.

Now, on behalf of Mr. Blackman?

MR. SCHULMAN: Thank you, Your Honor. May it please the Court, Adam Schulman, and I represent the objector, Mr. Blackman.

Preliminarily, I'd like to thank the Court for permitting response and reply papers to be filed with respect to the objections because I think it has enabled a thorough briefing of all the relevant issues. We don't see that in every settlement that we participate in.

I'd like to pick up on just a few of those issues here. If the Court had any pressing issues, I would be glad to begin there?

THE COURT: No, that's fine.

MR. SCHULMAN: But before I get to the objections themselves, I do want to expand a bit on one argument in their opposition to defend this Motion to Strike. Mr. Blackman demonstrated how he fits within the parameters of the class definition, as well as the Gym Cancellation subclass definition and how he, therefore, has standing to object to this settlement.

But more than that, as averred in his Declaration, he submitted a timely claim form back in December. All the lawyers for the parties, the settling parties today, have acknowledged that he will be paid his claim. Thus, they are

acknowledging implicitly that he is a class member. If he wasn't a class member, he wouldn't be paid his $25 on the claim. And all he needs for standing to object and to deny the defendants' Motion to Strike is the fact that he is a class member, that gives him standing to object under Devlin and other case law.

And I want to say that the determination of the claims administrator as an agent for the parties under the settlement, they were given authority to determine who is a class member. They have determined that he is a class member. So, defendants should be precluded, in fact, from arguing otherwise.

In all likelihood, it was a deliberate choice to include Mr. Blackman and those similarly situated within the scope of the class because the defendant wanted the broadest release possible at the time of settlement. They wanted the broadest waiver from the most possible, potential parties that could sue them in the future. That's why they expanded the class definition to include all of the people who signed the cancellation agreement.

And yet now because Mr. Blackman appears as a dissenting class member, they have concocted a flimsy rationale of why his objection should be stricken, and the Court should reject these games and deny the motion in no uncertain terms.

Now, I wanted to attend to the substantive argument

of the objection. And I think it is useful to clarify a few of the arguments that Mr. Blackman is not making but which the settling parties would like to attribute to him. The first of those is that he is not arguing that the sum of the total constructive common fund is inadequate. It is fine that the settling parties are settling for roughly $4 million and not $17 million.

As the Pampers court noted, the Court can usually trust a legitimate adversarial negotiation to get the aggregate dollar figure correct. Rather, Mr. Blackman is contending that the allocation of that $4 million is unfair because class counsel is winding up with roughly 60 percent of the total. The class representatives are getting thousands of dollars each. And 8 or 9 percent of the class members wind up with an average award of just over $30 while the remaining 92 percent of class members wind up with nothing.

The second argument that they would try to attribute to Mr. Blackman that he is not making is that there has been an explicit collusion between the settling parties to sell out absent class members. Mr. Blackman need not make that argument because as the Pampers court stated, the adversarial process -- or as the parties here refer to as hard-fought negotiations -- extends only to the amount that the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel and unnamed class members. The

economic reality is that the defendant is indifferent with respect to who actually benefits from the settlement funds provided. Because of this, the Court must seek out quote, unquote subtle signs in the provisions of the settlement itself that indicate unfairness. Those provisions are here in spades, a disproportionate fee award resulting from the unnecessary claims process, A disproportionate incentive awards of named plaintiffs, clear sailing agreement --

THE COURT: Can I go back to your first statement?

MR. SCHULMAN: Yes.

THE COURT: A disproportionate fee award resulting from the claims process?

MR. SCHULMAN: The claims process. Because the claims process was there to depress actual class recovery. It was never really 17 or 19 million dollars or whatever figures the plaintiffs were proposing originally. That was just an illusory number that they invented.

THE COURT: When you refer to "fee award", you are talking about attorney fees?

MR. SCHULMAN: Right. I am talking about the 2.39 that the settlement provides.

THE COURT: And how is that impacted by the claims process? Are you talking about the claim filing process?

MR. SCHULMAN: Right. The claim filing process is impacted because the claims filing is a mechanism by which they

could actually not give -- a mechanism which constrained actual recovery by class members to 1.5 or 1.6 or whatever it ends up being.

THE COURT: Are you suggesting that it is the proportion that was impacted by the --

MR. SCHULMAN: Right, by the claims process.

THE COURT: Okay. Not the absolute dollar amount of attorney fees in the settlement?

MR. SCHULMAN: Right, the proportion was impacted.

THE COURT: The proportion between the benefit to the class and the potential attorneys award.

MR. SCHULMAN: Right, correct. Because if they use a direct distribution mechanism, then the proportion would have been in proportion. It would have been $17 million to the class and 2.39 to the attorneys. But because of the claims process, it took it out of alignment, out of equilibrium.

THE COURT: I understand what your argument is now.

MR. SCHULMAN: Thank you. And the third argument that Mr. Blackman is not making is that employing a claims process instead of direct distribution is somehow per se illegitimate or unreasonable. Rather, Blackman suggests only that the settling parties have the burden of justifying the claims process and that in this case they have not discharged that burden.

That the parties resort to the inaccuracy of the

defendant's records is not satisfying in general and especially not in this case. That theory flies in the face of all of the representations of the parties as well as the settlement administrator as to the excellence of the direct notice program.

As Your Honor mentioned earlier, the one case where that rationale was upheld, I believe it was the Educational Testing Services case from Louisiana that the plaintiffs cited. In that case, the objector had proposed that the claims be distributed along with the notice before any of the verification.

As Your Honor recognized when questioning plaintiffs' counsel, that is not the argument that we are making. We say only after the verification had verified, you know, 91 percent of the addresses, that then there should have been a direct distribution.

And yet in the end, even though Mr. Dahl in his Declaration attested that the postal notice reached over 90 percent of class members, of potential class members, of households, benefits won't reach 90 percent of class members, they won't even reach 10 percent of class members because of the claims process.

The stated reasons why they won't, the parties are afraid that a few non-class members will commit check fraud for amounts ranging from $5 to $75 by endorsing and cashing checks

that are not addressed to them. The parties have put nothing on the record substantiating this concern, even though the onus is on them to do so. In the vast majority of claims-made settlements, there is a reason that the parties foreswore direct payment mechanism. Here, we haven't heard a good reason yet.

And one last argument that Blackman is not making, is that the UAW seven-factor test is irrelevant and should be ignored. Blackman does concede that that test does matter, but as the Sixth Circuit demonstrated in Pampers, Vassalle and in Williams, that test -- those factors are not an exhaustive catalog of reasons to reject the settlement.

The most common defect of settlements are ones of allocation between class members, class counsel and the class representatives. Because of the defendant's indifference to this allocation, the only supervisory function that can be achieved is by the participation of objectors and the District Court itself.

I ask the Court to seriously consider the reality of this settlement. The parties initially asked the Court to view this settlement as providing a 17 to 19-million-dollar benefit to the class members. Mr. Blackman challenged them on this point, and now we know the benefit will be most likely about $1.5 million and no more than $2 million. But now they encourage the Court to rely on other pernicious fictions to

uphold the settlement, fictions that the Sixth Circuit has disavowed. They claim that the separate ex post negotiation of the fee award means that the class relief and fees can be treated and considered separately. Pampers rejects this, and so do cases from other circuits. The fact of the matter is that as long as the settling parties know that a fee negotiation is coming, they will account for that in the initial negotiation of the class benefits.

As the Community Bank case -- which we cite out of the Third Circuit -- states: The only apparent way to cure this problem is to defer fee negotiations until the class settlement has been signed, submitted and approved by the district court. Or if the defendant refuses to agree to any settlement that does not also include attorney fees --

THE COURT: Could I interject here?

MR. SCHULMAN: Yes.

THE COURT: Your most recent statement, how does that comply with Rule 23(h) or would that process that you just alluded to, would that require a second round of notice to the class?

MR. SCHULMAN: It would require a second round of notice under 23(h), but email notice, though, I think would be sufficient and would not be too costly in this case. But you are correct, 23(h) would require that. You are exactly correct.

Or if the defendant refused to agree to a settlement that does not also include attorneys fees, the best way to do this is to structure the settlement as a transparent common fund. Because at least in that case, any excessive fee requests, whether as a result of intentional self-dealing or unintentional overvaluation of the class benefit, that fee request can be mitigated by the court without reducing the total amount that the defendant is willing to pay.

For instance, if Your Honor approved this settlement and reduced fees, the excess -- because of the provision as written in the settlement, the excess would revert to the defendant. And as the Bluetooth court said, there is no apparent reason why that should be the case, why the amount of money they agree to should not be distributed properly amongst the class and the attorneys. And those principles are the core of the Bluetooth decision.

The parties also claim another fiction, that the Court should credit class members' silence as a full-fledged endorsement. Though, Mr. McCormick did seem to be backing off that argument today. They ignore the caution in their papers, at least, of the Sixth Circuit that quote, unquote, it is to be expected that class members with small individual stakes in the outcome will not file objections.

And at the end of the day, we are left with an untenable settlement that is overly generous to both class

counsel and the named representatives. To class counsel, they will get more than 60 percent of the proceeds -- more than double a reasonable fee. To the named representatives, they will get enhancement awards of between $1,000 and $5,000 each -- many times the plausible value of their claim. And to 92 percent of the class members, they will get absolutely nothing in exchange for release of their claims.

I did want to note, since there was a specific discussion of the Pampers and Bluetooth cases, I would like to to tell the Court honestly that we believe this settlement is better than those two settlements. But those two settlements are not -- this settlement doesn't have to be as bad as those two settlements to warrant rejection. And we think it is clear that this Court should reject this settlement.

As respect to Lonardo, this settlement, we think, is worst than Lonardo. In Lonardo what happened was, originally, it was quite similar to this case initially, it was something like $5 or $6 million to the attorneys and only $2.8 million to the class. But after it came in as objected, what the parties did was they agreed to modify that settlement and transfer $2 million of their fees to the class, so at least they weren't taking more than 50 percent.

Now, in the 40s, we think that under Dennis v. Kellogg, which said that 38.9 percent was clearly excessive -- 40 percent is still clearly excessive, but it is not as

excessive as this settlement. This settlement is worse than that case.

THE COURT: Can I ask you?

MR. SCHULMAN: Yes, of course.

THE COURT: Again, going back to the direct payment process of the claims --

MR. SCHULMAN: Right.

THE COURT: In your opinion, is a claims-based process ever justified?

MR. SCHULMAN: Yes. We do think it is justified. I don't know -- you probably don't have my reply brief in front of you, but on Page 4 of Mr. Blackman's reply in support of objections, we go through pretty much all of the cases cited by plaintiffs and defendants and show that in the vast majority of those cases, a claims process was justified, either because the class members had to make a choice between cash and in-kind relief.

And Mr. McCormick said earlier that he thinks that that somehow means that we think those settlements are better. No, we just think -- that only implies that the claims process in that case was justified, not that it complied with all of CCAF's regulations about coupon settlements. But that's one scenario where a claims process is justified. And the most common is where the defendant doesn't have the information as far as the identity of the class members or the amount of the

claim that they are due. That's another situation where the claims process is justified.

And we are not taking issue -- we think it is good that there was an open claims process in addition to that here, our grievance is with the fact that they didn't utilize a direct distribution for class members that they did know about, they made them go through the burden of the open claims process, even though they didn't have to. That's the objection.

But no, we are definitely not arguing that it is per se unreasonable or inherently unobjectionable or anything like that.

Thank you, Your Honor.

THE COURT: Who will it be?

MR. ROSE: Me, Your Honor.

THE COURT: All right. Thank you.

MR. ROSE: Good afternoon now. I'm Josh Rose. I represent Robert Zik, April Zik and James Hearon. Robert and April are married.

And we have been -- I have been litigating this case with Mr. Belzley for over three years. Actually, the case that I filed was filed before any case that any of the plaintiffs here filed. We put in a lot of good, hard work to develop the Ziks' and Hearon's claims, and let me tell you about their claims. I am going to touch on the issue that they have been

talking about the most, which is the fiction of the value of this settlement. And I'll touch on that in a minute.

But I want to first go to what hasn't been talked about yet, and that's the difference between the Ziks' claims and any plaintiffs' claims here. There is a very material difference. The Ziks have a contract that has a one-billing cycle post-cancellation in their contract. I would be happy to show it to you, and we can go through it right now, if you like, but it is attached to my pleadings, and it is very clear.

It is a one-billing cycle cancellation clause, which means if they give cancellation notice in November, they can be charged for December under the contract, but they cannot be charged for January, okay? But they were. They were charged for January. They were charged two months post-cancellation.

They and like the tens of thousands of people just like them with a one-billing cycle cancellation clause were charged two months. At the very least from June '09 to June of 2010.

Now, we have developed evidence that Urban Active were charging the two-months cycle, regardless of what kind of contractual language you had in your membership contract before and after that date; but, admittedly, they charged the two months, regardless of what was in your contract for that year. And for that one year alone, there were over 100,000 cancellations.

Every contract -- and this is undisputed in any of the briefs -- every contract that Urban Active sold prior to March of 2008 was a one billing, a one-month cancellation clause, okay? Their records showed that members stayed for years very often, very often, just like the Ziks who canceled in December of 2009 but were charged two months. Their corporate policy was not to look at the cancellation language in the contracts and see, was this a cancellation clause like the one in Robins? Or like the one that every plaintiff in this case had, a two-month billing cycle cancellation, or was it one like the Ziks had, which was the one-month cycle cancellation clause, like all of our contracts prior to March of 2008.

That was not their policy. In deposition, which I have attached to my briefs, their policy was charge the member two months no matter what. My clients' claims, the Zik claims, unlike the claims in Robins, which the Robins court dismissed because they said, well, you are not due the extra month because your contract says that you can be billed two months post-cancellation, my clients' claims and the ten of thousands of people just like them, clearly under the contract cannot be billed two months, but they were anyway.

Now, not only were they not adequately represented, which is required by every case that you can ever look -- Amchem, U.S. Supreme Court, Sixth Circuit -- not only were they

not adequately represented, the Ziks, I mean, how could they be represented at all? Not one plaintiff had contractual language with the one-month billing cycle. They can't adequately protect the Ziks.

The first step in adequately protecting the Ziks would have been to call their attorney and tell their attorney that we are involved in some settlement negotiations. Would you like to participate and present your side of the case for the Ziks and the tens of thousands of people like the Ziks? That was never done, despite the fact that I and Mr. Belzley worked hand-in-hand with Mr. McCormick and his colleagues for six months, while every other Kentucky case was stayed, to defeat a very egregious settlement in Seeger in the Boone Circuit Court in Kentucky.

It had a similar unnecessary claims process. It also had -- they claimed it was a coupon only settlement, it wasn't -- the claimant could also submit proof for a cash payment in the form of an affidavit or some other type of proof for a cash payment. So, it wasn't only a coupon settlement.

Now, in Seeger, the claims response rate or approval rate was less than 1 percent. This is a settlement that Urban Active negotiated with the plaintiffs' attorneys down in the Seeger case. Their settlement administrator on the stand at the Seeger Fairness Hearing testified, just like Mr. Dahl did, that a consumer claims notice, settlements like this, you are

probably going to get an approval rate between 2 and 11 percent, 12 percent. I think he may even have said 15 percent under optimal circumstances.

The defendant and plaintiffs -- Mr. McCormick knew this well, we went through the whole process in Seeger and the literature and the case law will support this as well -- but they knew there was no $19-million value. Every settlement administrator that they have ever dealt with, the literature, the case law, the administrator who testified in this same case in Kentucky, a very similar case in Kentucky, testified it was between 2 and 12 percent. It was not -- so, they had no illusion that the settlement value to the class would ever surpass 2 million, two-and-a-half million under even optimal circumstances. So, that was a major fiction.

The other fiction that I mentioned is that the Ziks' claims are just like their claims. We know that they are not. The case law is very clear, it says if you have a different contract, how can you have the same claims? How can you release claims that are not based on an identical factual predicate? The basis of these claims, the Ziks' claims, are in their contract. The core is in their cancellation language. They weren't represented -- they weren't adequately represented by anyone other than me and Mr. Belzley who were not invited to this party until now.

Now, that brings us to the overbroad release. The

case law says that you can only release claims with identical factual predicates. They added a clause into the release that says "or related to factual predicates that they brought". And they add an explanatory paragraph or long sentence that tries to explain what related means. And what they say "related to" means is any claim that has to do with the sale of a membership, billing a member, communications with a member, any type of claim related to that is released forever -- 606,0000 people.

And of these 606,000 people, you have got people all across the board. You not only have groups like the Ziks and Hearon, who have -- the Ziks have clear breach of contract claims. Mr. Zik is owed $75. His membership was $50. He has got a contract, by the way, that also has no $10 cancellation fee in it. Not one plaintiff here, not one plaintiff in Robins had a contract that excluded a $10 cancellation fee on the back. Those plaintiffs were making that claim because they thought it was misleading -- to bury a $10 cancellation fee in fine print on the back of a contract.

Well, we believe that, too, but fundamentally, Mr. Zik does not even have the $10 fee on his contract. And just like the extra month in dues he was charged and billed, he was charged the $10. Nobody has the claim he does on the $10 charge, but it is not just bad for him and people like him and his wife April. It is also bad for people in Kentucky that

have Kentucky Health Spa claims -- well, let me back up. Before I get there.

Their argument seems to be with respect to my clients' claims and the people like him, well, it doesn't matter because most of the people like them would only have received $40 or the opportunity to receive $30 or $40 under this settlement, so it really doesn't matter anyway. That completely misses the boat. They have claims, potential claims just like people in other cases for having misleading remarks, consumer protection claims.

What they needed to do was to settle and negotiate additional compensation for people that have a clear breach of contract claim, instead of the Ziks and people like them receiving the same amount of money as people who have no breach of contract claim, according to the Robins court, that was not done. They each received the same amount of money. Is that fair? No, it can't be fair. It cannot be fair.

Is it fair for the Kentucky citizens who have unique claims under the Kentucky Health Spa Act? And the claims under the Kentucky Health Spa Act that plaintiffs have always focused on are not claims that are available under any Ohio Statute or any other state statute where Urban Active did business. These claims required health spas to register the costs of all of their membership plans, including the monthly rate, if there are any cancellation fees, if there is any Facility Improvement

Fees. And if they didn't register and if they didn't also show the member a comprehensive list of all plans available and registered when the member signed up, that member is entitled to voiding the contract and disgorgement of any difference.

So, for example, if you have a member -- if you have a member like some of Mr. McCormick's clients who signed up for $49.99 a month, but the registered plan was only $29.99 a month, and the plan that should have been disclosed in the list to the member was only $29.99 a month, he would be entitled to $20 for however many months he was a member. Now, that can add up to a lot of money.

And for some people, it is going to be zero. For some people it is going to be hundreds of dollars, just like he represented to the judge down in the Seeger court when he was so vigorously objecting to the settlement. Your Honor, you cannot approve this overbroad settlement, you know, for a possible payment of $30 because some of my clients are owed hundreds if not thousands of dollars, he said. Well, that's true for some of his clients. Those groups of people were not adequately represented.

Not one more penny was negotiated for Kentucky members who have Kentucky Health Spa claims -- not one penny. That's not fair to them; that's not fair to them.

Even if this illusory value and the claims process is okay -- which I don't think it comes close to being okay -- it

is not fair that those Kentucky members get the same amount of money as members who do not have claims like them. They don't have even an opportunity to present claims like them, much less the hundreds of dollars in damages that some of them have.

Another really bad example of the overbreadth of this sprawling settlement is the facility improvement fee subclass. You have got some people like Mr. Cary who in his contract it said he could be charged a Facility Improvement Fee of $15. It was on the back of his contract. They made claims that that's misleading if you bury that provision, it is misleading. He was charged this fee nine times, 15 times 9, $135.

You have got some people like Mr. Volkerding where, that the $15 Facility Improvement Fee was not in the contract. He clearly shouldn't have been charged, but he was anyway. So, you have got people that have clear breach of contract claims on Facility Improvement Fees. You have got some people, according to the Robins court, no claim or possibly a claim for misleading behavior if you are able to convince another court of that, other than the Robins court. And you have some people with this Facility Improvement Fees that they are claiming nine times, eight times -- it depends on how long you were a member there, a biannual fee of $15. Everybody gets $20. How is that fair? Some people aren't owed anything, and some people are owed $135.

Amchem -- and the case law is very clear, you have to

develop subclasses when you have material differences. These are very material differences. They need to break out the subclasses much, much better to have any chance of being fair.

Now, you didn't hear testimony from any of these class members, like Mr. Volkerding or Mr. Cary, explaining to you why he thought it would be fair for him to get $5,000 and for some people like him, you know, to get zero and some people that had claims a lot better than his and more than his to get $20, if they go through the claims process. You didn't hear from people like that. But we don't need to, it is obvious. It can't be fair, these claims are materially different all of the way through.

And I really urge the Court -- I don't want to do it right now, I could be here all day literally -- but I urge the Court to read through the Third Amended Complaint of the plaintiffs in great detail and look at how disparate the claims are and start thinking about different groups of people and how they were affected and how good their claims are and how much money they would be owed. And you are going to come up with many more examples other than what I just told you.

Now, fairness is based on reality. It is not based on fiction like them telling this Court that my clients' claims and people like them are identical to theirs. That's pure fiction. It is undisputed in the evidence before you. They may say it in their briefs, but if you look at my clients'

contracts that I have attached and you look at the evidence that I have presented, it is undisputed in the evidence.

It can't be fair when people aren't properly represented and subclasses are not divided out to pay people what they need to be paid and what they ought to be paid. You have got people like Mr. Blackman, and no offense to Mr. Blackman, but he is going to get $25. Meanwhile, some people and groups of people who have irrefutable claims like Mr. Zik who is owed $75 will get $25; is that fair? No, it is not fair for people with no claims to get money, and people with irrefutable claims to get the same amount of money.

This really boils down to nothing more Urban Active wanting to buy their piece with an overbroad settlement. And their peace meaning, let's get rid of all of these lawsuits at once. Mr. Rose's lawsuit that he filed first in Kentucky three years ago, the Seeger lawsuit, the lawsuit in Robins -- although that's on appeal -- Mr. McCormick's numerous lawsuits both in Kentucky and Ohio -- let's get rid of this, any claim that any member may ever have related to their membership, 606,000 people and let's try to get rid of it as cheaply as possible, and by that I mean $3 per member. $3 per member. That's not fair. That is not the class action mechanism working; that's the class action mechanism not working.

The plaintiffs want to take shots at me, saying that I am only here interested for fees. I am not a wealthy man,

Your Honor. If I did not have an ethical obligation -- both morally to the Court and to my profession -- I would have taken $150,000, $200,000 or $250,000 and run. I have three small children, and I am not wealthy. I am not here today for money. I have to preserve the record and ask for an award if this Court approves this egregious settlement. I have to do that. I have to protect my working investment. But that's not why I am here. If all I wanted was money, I would not be here.

That's all I have to say. I would be happy to answer any questions, Your Honor.

THE COURT: On that last point, you said you are asking for an award if the Court approves the settlement. How would that work? Are you suggesting that from the amount allocated for attorney fees that a portion of it be awarded to you?

MR. ROSE: It would have to work like that because Urban Active has not agreed to pay one penny more than $2.39 million plus the claims. It would have to work like that.

Just like Mr. Blackman is objecting and asking the Court to reduce the attorney fees and give some of it to the class or to give some of it to me or the other objectors.

THE COURT: I mean, what would be the Court's authority to do that? Just in its authority to determine a reasonable --

MR. ROSE: Absolutely. In the Manners case, which

the plaintiffs relied on -- it was actually a good settlement -- I think it was a 193-million-dollar benefit to the class, cash benefit to the class. Plaintiffs' counsel down there only got about $9 million. The objectors came in and approved the settlement sum, and they were awarded $600,000.

All it is based on is what the Court believes is fair under the circumstances.

THE COURT: Well, wouldn't the Court have to sustain an objection in order to do that?

MR. ROSE: Not necessarily. We worked for six months, just like plaintiffs worked for six months to defeat the Seeger settlement. If that settlement is approved, this settlement right here does not include any Kentucky members, over 200,000 people. They are making claims for attorney fees based on that work. Obviously, we should be, too.

We were working hand-in-hand down there, and that's the undisputed evidence. We contributed to this case very substantially, not only in Seeger but down in Louisville, Kentucky where we filed the case. In fact, we were on the eve of our class certification hearing. And by the eve, I mean it was Friday, and our hearing was on Monday. Our class certification hearing for Ziks and Hearon was months in advance of any other plaintiffs' class certification hearing. They have been negotiating with Urban Active -- supposedly without our knowledge -- for six months or more. They are already two

months post-mediation. I wonder if the fact that we had this teed-up for certification, my case, had anything to do with Urban Active finally bridging the gap. I bet that it did.

And so, those would be the two primary bases for any attorney fee award. But I really hope the Court does not go there. Like I said, I am not here for fees, but I am here to object to the settlement because it is not fair to many, many people. And that's primarily why I am here, okay?

THE COURT: Thank you.

MR. ROSE: Thanks.

THE COURT: Mr. McCormick? I want to give both the plaintiffs and the defendant an opportunity to respond.

MR. McCORMICK: If we could take a break?

THE COURT: That's fine. Let's take a recess of 15 minutes.

Well, how long is this going to be? I don't want to turn this into a trial by ordeal. Should we break for a quick lunch?

MR. McCORMICK: I don't imagine more than a few minutes of rebuttal.

MR. McGRATH: Correct.

THE COURT: All right. Fifteen minutes.

MR. McCORMICK: Thank you, Your Honor.

MR. McGRATH: Thank you.

THE COURT: I will ask the Clerk to recess court.

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THEREUPON, a recess was taken.

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THE COURT: Mr. McCormick?

MR. McCORMICK: Yes, Your Honor. My colleague, Mr. Travalio, is going to say a few words in rebuttal to the Enhancement Payments and the Motions for fees.

THE COURT: All right.

MR. McCORMICK: And then I will have a few comments with respect to the merits of the settlement.

THE COURT: All right.

MR. TRAVALIO: Good afternoon, Your Honor. May it please the Court, throughout his brief and argument, Mr. Schulman claims that the defendant's concern with the total cost of his liability and for a combination of class relief and attorney fees is somehow relevant to the case. The fact is, of course, in every case a defendant who case faces the potential for fee shifting is concerned about the ultimate cost of both, the settlement to the plaintiff and the fee shift. That's true at any time in any settlement.

Does this say anything at all about the plaintiffs' ability to separate the discussion, separate the negotiation of class payment from fees? Which is exactly what happened in this case to which three attorneys have attested. It doesn't say anything about it. All it says is that any defendant in

any case is concerned about how much he is going to pay all of the way out of his checkbook or out of his pocketbook.

Does it suggest that somehow we inappropriately unethically mixed our fees with the class settlement and sold out the plaintiffs? Absolutely not.

We decided on class relief in this case, and we settled on class relief in this case, but what Your Honor has already seen is an exceptional settlement that there was no discussion of fees. After the discussion and after the conclusion of class relief, it is true we discussed, and we had a hard negotiation about it with respect to our fees. And, in fact, as Mr. McCormick has said, we agreed to take less than our lodestar fees, and the reason we did it was to get our class the relief that we got.

How do we know from this case that we didn't -- that counsel didn't breach its fiduciary duty to the class? Well, Mr. Schulman asserts -- and I emphasize asserts -- that the negotiation of attorney fees and class relief can't be separated. He asserts -- he offers no proof for it, and he doesn't give any argument as to why. It is untrue; he simply asserts it. And, of course, his assertion isn't true. There is absolutely no reason why class relief and fees can't be ethically separated. To the contrary, they can be. They are routinely separated.

Settlements are routinely approved in which the

attorneys, as we have, assert that they have been separated and are willing as officers of the court to represent to the Court that that has happened. And Mr. Schulman's repeated and emphatic assertions in his brief and in his argument today to the contrary doesn't make it so.

Again, how do we know that they were separate in this case? The first and the primary evidence is the great settlement that we have gotten for this class. That's the best proof of the fact that we haven't misallocated anything to the plaintiffs or to the class representatives.

The few cases cited by the objector, Pampers and Bluetooth, are cases in which we demonstrated the relief is virtually valueless. Comparing these cases to our case -- I have described to my colleagues -- is like comparing apples to armadillos. There is no comparison.

How else do we know it? We know it by the incredibly small number of objectors. Mr. Schulman suggests that that's really a matter of indifference or inertia with respect to the class. His client purports to be objecting out of a concern for the fairness of the settlement to the class, notwithstanding his lack of any damages.

And Mr. Schulman, by his argument, must be suggesting that his client is the only person out of 650,000 people -- or 605,000 -- excuse me, Your Honor -- 605,000 people sufficiently outraged by this settlement to object. The real explanation,

which I would suggest, for the utter lack of objection is the settlement is eminently fair, as we demonstrated to you, and the class members are more than satisfied with the terms of the settlement.

And, finally, how do we know that the fees and class relief, as they are in the multitudes of cases that are approved by the court, were independently determined in this case? Is that you have three lawyers who have declared as officers of the court that that's what has occurred, and none of the objectors has a whit of evidence to the contrary.

And at the very least, Your Honor, when three lawyers, all of impeccable reputation, tell the Court that something is true, the Court should at least presume that it is so, and in my view, anyway, should place a heavy burden on anyone who presumes to suggest to the contrary.

One final thing, and that is this idea that keeps cropping up about this being a common fund case constructive or otherwise. This is a lodestar case, Your Honor. It is demonstrated why it is a lodestar case, which courts often do cross-check against common fund, and we have no problem with that.

Mr. Schulman asserts on Page 10 or 11 of his reply brief, that if the plaintiffs had adopted the approach of the Community Bank case in which the parties got approval of the settlement terms before an agreement on fees, he admits -- he

says there would be no constructive common fund. Well, Your Honor, the Community Bank approach, if you think about it, adds nothing. If there is no constructive common fund in Community Bank, there is no constructive common fund here.

The fact is in both cases, the defendant, of course, remains concerned with his ultimate liability. That doesn't change in any case. Moreover, seeking approval of the class settlement in advance of a formal discussion of fees doesn't prevent the very danger that Mr. Schulman suggests here, and that is that the parties somehow surreptitiously mesh and mesh these two components. That can happen in the Community Bank situation as well as it can happen in the situation in which the parties as part of the negotiations first and independently negotiate class relief and then second and independently negotiate fees. At the time that the fees were discussed, the class relief had been fully and finally determined, and as you have seen, Your Honor, the class relief could hardly be better.

And, finally, again, just to say one last thing about this Community Bank approach. Again, Mr. Schulman admits that there is no constructive common fund here. In both contexts, Your Honor's obligation is precisely the same, whether you do it seriatim by approving a settlement and then approving a fee agreement or whether, as is your responsibility, your duty in this case to look at both the class relief and the fees as reasonable fees doesn't matter whether it is seriatim or not,

you still have an independent responsibility to make an independent evaluation of both of those.

So, I would just say, Your Honor, in conclusion that we have got a great settlement here. Your responsibility both with regard to the attorneys fees and the class relief is to decide as a whole whether it is fair, reasonable and adequate. And I think there is only one conclusion that we can come to, it certainly is. Thank you, Your Honor.

THE COURT: Thank you.

MR. McCORMICK: Thank you, Your Honor. I just have a couple of points to make in response to some of the comments that we heard with respect to the merits of the class action settlement before you today.

First and foremost, Mr. Zik's counsel argued passionately to the Court that his claims are different than everyone else's claims that is represented here in this settlement. This position is directly contradicted by Zik's own objection in this case, and it is directly contradicted by Zik's own allegations in his lawsuit in the Louisville state court. And I will specifically refer you to Page 5 of his objections.

He tells the court the objector sought certification of simply defined, contractually based -- I'm sorry, let me start that over -- objector sought certification of a simply defined contractually based class of hundreds of thousands of

members who canceled their month-to-month memberships with Urban Active from February 2nd of 1996 through present. And after such cancellations, they were charged additional fees after they canceled and charged a $10 cancellation fee.

So, Mr. Zik's claims are the same contractually based claims as hundreds of thousands members who canceled from 1996 to present. His claims are clearly the same as those of our cancellation subclass.

The fact is that the factual predicate underlying all of the claims of our cancellation subclass, including Mr. Zik's claims, is that class members tried to cancel their contracts, and they were either outright denied the ability to cancel, or they continued to be charged after the cancellation. These are the same factual predicates that underline all of the cancellation claims brought in the Zik litigation, the Seeger litigation and the Robins litigation, the factual predicates are the same.

The second point made by Mr. Zik's counsel is that somehow the Kentucky Health Spa Act made those Kentucky class members different than Ohio subclass members and members of other states. That's simply not true. The Kentucky Health Spa Act has specific provisions that allow for rescission and voiding of a contract. Similarly, PECA here in Ohio has provisions which allow for the voiding of a contract. Similar Consumer Sales Practices Acts in Tennessee have similar

provisions which allow for voiding of contracts. All of these statutes and all of these claims were given consideration, and they were negotiated as a part of the settlement.

With respect specifically to the Health Spa Act claims because Mr. Zik spent quite a bit of time on it, and I know we addressed this in our papers, but there is absolutely no case law interpreting the Kentucky Health Spa Act. So, our claims are based on a statute in which there is no judicial interpretation which says what the appropriate level of damages are when you rescind a contract or void a contract.

Now, that leads us back directly to what I said at the very beginning of my presentation, that Urban Active had very strong equitable arguments against damages in excess to what we already negotiated in this settlement.

And the last point I want to make because it is misrepresentation of the facts is that there is no situation of Kentucky Health Spa members signing contracts for $49 when the contract was actually $29. We have all of that data from Urban Active's third party vendor software because we subpoenaed it, and we through our IT staff have done technical analysis of that data. And the vast majority of the cases, which we would put forth as violations of the Kentucky Health Spa Act actually show that Urban Active sold memberships for less than what the price was registered with the Kentucky Attorney General.

So, again, that brings us straight back to the

equitable argument, that while we are confident that we can prove a violation, we have significant hurdles in proving damages in excess of what we already negotiated as a part of the settlement, and that's what makes this settlement a great settlement.

Last, Zik-Hearon's counsel argues that there were hundreds -- or tens of thousands, maybe hundreds of thousands of class members that were out there that had significant damages far in excess of what we negotiated as part of the settlement -- factually, that's untrue, or factually, there is no evidence to support that, given that there were only 90 opt-outs and two objectors. If there were hundreds of thousands of members who had damages far in excess of what we negotiated, the Court could certainly expect the number of objectors and opt-outs to be much higher.

Secondly, for Mr. Zik specifically, if he feels that the settlement as it was negotiated and as provided is inadequate, that's why Rule 23 provides opt-out rights. The purpose of a class action settlement and class counsel's goal and motivations in negotiating this settlement was to get the greatest amount of good for the greatest number of people that suffered violations at the hands of Urban Active's common policies and common practices.

And as we showed you in one of the first slides we presented, in negotiating an available recovery of up to

$17 million for 600,000 class members and all that class member had to do was file a simple claims form containing basic name, address and class member eligibility information, that, Your Honor, provides a great amount of good for a lot of people, and that is what makes this a great settlement for the class because it provides tremendous value. Thank you.

THE COURT: Mr. McCormick, could I ask you to address -- I apologize -- I think it was Mr. Rose's argument -- or claim that even if the settlement agreement is approved, the claim for an award of attorney fees.

MR. McCORMICK: We don't think that that claim has any merit. In order to recover attorney fees, the objectors would have had to have materially affected the settlement agreement, and the settlement agreement, as it was reached here and as it has been presented to the Court, we believe it is incredibly fair, it is incredibly reasonable, and it is a great recovery for the class. And so because they have not benefited the class, they did not assist prosecuting this negotiation -- I'm sorry -- they did not assist prosecuting this litigation, they did not materially change the terms of the settlement agreement, we think their request for fees would have to be denied.

THE COURT: Thank you.

MR. McCORMICK: Yes, Your Honor.

MR. McGRATH: Thank you, Your Honor. At the very

beginning of this, when Mr. McCormick stood up, he talked about the fact that the Court has to look at the overall fairness of settlement to decide whether to approve it. In all of the discussions and the arguments by the objectors in their briefs and their presentations today, they haven't spent a lot of time talking about who are the people? The people in the settlement are people who joined a gym. A lot of those people are young. A lot of those people are transient. If you look at where Urban Active had their facilities -- Lexington, Louisville, Cincinnati, Columbus -- these are college towns with lots of young people. That's the population. And the vast majority of these people got exactly what they wanted they joined Urban Active. They got a gym to work out in. And this concept that because people aren't rising up in the streets to protest the settlement is likely the result of the fact that most of these people don't feel like they were harmed.

I can tell you, Your Honor, when these lawsuits were filed -- I have been involved in these from the very beginning, every single one of them -- the first lawsuit was filed in December of 2009, that was the Seeger case. We litigated that case for over a year before any of the other cases were filed. Members who saw this and heard about it came to the company and told people, look, if you need somebody to tell them, tell these people that we like what we got, we will do that. And we didn't think that was necessary evidence to put in here.

But from our perspective in looking at that, the reaction of our membership, the significant legal defenses that we had in this case, and Mr. McCormick touched on it, the Kentucky Health Spa Act, there is no law in the Kentucky Health Spa Act. Equitable defenses that we had, the arguments that we made to you about discovery, why discovery should be limited because of the types of claims that we had.

And the most important piece, the Robins decision, okay? The objectors don't want to talk about the Robins decision because it destroys what they are trying to do. The Robins court interpreted the contract language and found that the contracts allowed Global Fitness to charge the fees that specifically these objectors, Zik-Hearon objectors, are complaining about. The Robins court -- and this is a point that Mr. Rose brings up -- the Robins court addressed a particular version of the contract language. It has been -- it is Global Fitness's position, has been its position all along, from the very beginning, that the cancellation language allows for Urban Active to charge two billing cycles when they canceled. It has always been that way. From the time the language was instituted in 2003, it had the right to do that under those terms. It clarified that language in March of 2008, that's correct. It changed the language to make sure that was clear.

But fundamentally, Global Fitness -- it has always

been our position that we could charge the two-billing cycle cancel fee. That we could charge the cancel fee once the cancel fee was put into the contract. That we could charge the facility improvement fee once the facility improvement fee was put in the contract. That we could charge a cancellation fee for early terminations on membership contracts because that language is in the contract.

And fundamentally, all of the plaintiffs in all of the cases are claiming that somehow or another misrepresentations were made to them or charges were made to them that weren't explained to them in their contract. All of these people were members. They had a contract. The contracts had particular terms and conditions, and they were charged fees that Global Fitness believes it had a right to charge. And fundamentally, all of those claims stem from those things. All of these objectors, all of these plaintiffs fall into the classes and the categories created in the settlement. And these classes and categories were created based on all of the claims and all of the lawsuits that we faced.

One of things Mr. McCormick raised that I think is important to note, this settlement covers all of Global Fitness's members and all of its states for the class period. That's important because about 90 percent of Global Fitness's members in this class period of time were either in Ohio, Kentucky or Tennessee. And the vast majority were in Kentucky

and Ohio. In Tennessee, there is no right, as a matter of law, to bring a class action lawsuit under Consumer Protection Law. So, these 30,000 or so Tennessee class members would not have a right to relief if they weren't allowed to participate in the settlement. So, they are getting a benefit that they would not otherwise have as a matter of law in a class action.

THE COURT: Is that really relevant to the consideration of the Zik objection? And that is that while it may benefit one category of members of the class, but another category is inappropriately joined in the class? I am not sure that I see the relevance of your last statement.

MR. McGRATH: Well, the relevance is, is when you are looking at the class or the settlement from an overall perspective, we are covering all of the potential different claims that people generally have, and that is that they were members and they were charged fees that they don't believe were appropriate.

My point is we are providing a benefit to everybody, regardless of what state law may be at play. When, ultimately, what they may recover in a particular state -- for example, Kentucky could be significantly less if our equitable defenses are true. Under Tennessee, it would be non-existent because we have defenses. But, of course, this is a part of the settlement negotiation process, and we tried to come to something that would compensate everybody who might have a

claim is the way it was put together, and that was the purpose.

I believe the final point here is that if someone has a claim that they think is valuable, they have a right to opt-out. And once they opt-out, they could pursue this valuable claim. And I think we had a total of 90 or 100 opt-outs or something like that, and I think that's significant because it shows in general that people who really wanted something, the 50,000 who filed claims, did get a benefit out of this settlement. Thank you, Your Honor.

THE COURT: We had some documents that were used during the course of the presentation or the testimony. I am not suggesting that it is necessary, but does anyone intend to proffer those documents into the record?

MR. McCORMICK: Well, first as a clarification, I did deliver a copy of Mr. Dahl's affidavit that we filed. The Court a couple of days ago noted that Page 4 was missing?

THE COURT: Yes.

MR. McCORMICK: We now have complete copies which we handed to your staff, and we will also electronically file that.

THE COURT: All right. I assume there is no objection --

MR. McGRATH: No objection, Your Honor.

THE COURT: -- to correcting the Supplemental Declaration?

For plaintiffs, the Power Point, the paper version of the Power Point presentation? Again, I am not suggesting that it needs to be entered into the record. I just want to make sure we have got a complete record.

MR. McCORMICK: Sure. We would like to have it entered into the record.

MR. McGRATH: No objection, Your Honor.

THE COURT: All right. Without objection, the Power Point -- let's call this Plaintiff's Exhibit 1?

MR. McCORMICK: Very good.

THE COURT: And it is admitted.

And then for the Zik objectors, we had our numbers document?

MR. BELZLEY: Your Honor, that was just an effort --

THE COURT: Just demonstrative.

MR. BELZLEY: I think it serves a valuable purpose in that regard because it kind of puts it in three pages what is strung throughout 10 or 20 pages of Mr. Dahl's Declaration. So, I would ask that that be admitted as well.

MR. GURBST: Could we reserve our objection to that for a couple of days to figure out what it said and to compare it?

THE COURT: To see if it is an accurate summary?

MR. GURBST: Correct, Your Honor. If I could have that opportunity? And if you don't hear from us --

MR. McCORMICK: We would join in the same.

MR. SCHULMAN: Mr. Blackman would like to say that I think one of the figures on the last page, we don't agree with, actually. It looks like the total claims to be 1.8 million, and I think that's wrong. It is actually too high because it multiplies the average claim by the amount of the deficiency. So, I would object.

THE COURT: Well, I tell you that I have had a chance to review Mr. Dahl's Declaration and his Supplemental Declaration and most recently again supplemented to include Page 4, and I think the representation is that all of these figures could be gleaned from that Declaration?

MR. BELZLEY: That's where I took them from, Your Honor.

THE COURT: Okay. Well, I don't think it is necessary. We are all perfectly capable of making the same gleanings.

MR. BELZLEY: That's fine, Your Honor.

THE COURT: So, that won't be admitted into the record. With that, is the record complete?

MR. McCORMICK: Nothing else, Your Honor.

MR. McGRATH: Nothing else from the defendants, Your Honor.

THE COURT: And for the objectors, anything further?

MR. SCHULMAN: No, thank you, Your Honor.

MR. ROSE: No, thank you.

THE COURT: All right. I did leave open this morning the possibility of further briefing. I don't know that there is any word left unsaid yet, but is there any interest -- or is it safe to regard the record as closed?

MR. McCORMICK: No interest from plaintiffs, Your Honor.

MR. McGRATH: None from the defendant.

MR. SCHULMAN: We will rest on our briefs.

MR. ROSE: The same, Your Honor.

THE COURT: All right. Thank you. We will regard the record as closed. I will undertake the issue of the Report and Recommendation as promptly as we can. Of course, the parties know that you still have 14 days to object.

I want to thank everyone for really an excellent presentation. It has been a very interesting case so far, and I am sure it will continue to be.

I will ask the Clerk to recess court.

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C E R T I F I C A T E

United States of America

Southern District of Ohio

I, Georgina L. Wells, Official Court Reporter of the United States District Court for the Southern District of Ohio, do hereby certify that the foregoing 112 pages constitute a true and correct transcription of my stenographic notes taken of the said requested proceedings, held in the City of Columbus, Ohio, in the matter therein stated on the 13th day of February, 2014.

In testimony whereof, I hereunto set my hand on the 5th day of March, 2014.

/s/Georgina L. Wells

Georgina L. Wells, RMR
Official Court Reporter
Southern District of Ohio